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REPORTS

OF

CASES AT LAW AND IN EQUITY

DETERMINED BY THE

Supreme Court

OF THE

STATE OF IOWA.

APRIL 9, 1903—MAY 29, 1903.

BY

W. W. CORNWALL.

VOLUME III.

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Table of Cases Reported

IN THIS VOLUME.

A

Adams County, Allen v....	63
Allan v. Bemis	172
Allen v. Adams County.....	63
Allen Bros. Co., Wolfson v..	455
Ames, Adm'x., v. Waterloo & C. F. R. T. Co.	640
Anchor Fire Ins. Co., Lutz v.	136
Antrobus, Ex'r., Hopkins v.	21
Augustine v. McDowell....	401

B

Baily, et al, Dunning v....	730
Baird, et al, Meyer v.....	597
Barrett v. Des Moines Mut. Hall & Cyclone Ins. Ass'n	184
Battles v. Roberts	748
Becke, et al, Bitzer v.....	66
Bell v. Inc. Town of Clarion	332
Bell, Riley v.	618
Bemis, Allan v.	172
Benton County Creamery Co., Creamery Package Mfg. Co. v.	584
Benson, et al, Powers v. ...	428
Bissell v. Bissell	127
Bitzer v. Becke, et al.....	66
Born v. Home Insurance Co.	299
Borden v. Isherwood	677
Bossingham, Syck v.	363
Branze v. Omaha & Council Bluffs Ry. & Bridge Co...	406
Brown v. Chicago R. I. & Pac. Ry. Co.	280
Brown v. Holden, et al.	191
Bruning, Lampman v.	167
Burge v. Town of Rockwell City	495
Burget v. Inc. Town of Greenfield	432
Burlington, C. R. & N. Ry. Co., Cedar Rapids Can- ning Co. v.	725
Burnham, Cox v.	43
Busby v. Busby, Ex'r.	536

C

Campbell v. Spears	670
--------------------------	-----

Carter & Co., Johnson Bros. v.	355
Carver v. Minneapolis & St. L. Ry. Co.	346
Cedar Rapids Canning Co. v. Burlington, C. R. & N. Ry. Co.	725
Cedar Rapids & M. Ry. Co., City Council of Marion v.	259
Cedar Rapids & M. Ry. Co. v. Redmond, Mayor	601
Ceprely v. Inc. Town of Paton	559
Chicago & G. W. Ry. Co., Selensky v.	113
Chicago, M. & St. P. Ry. Co., McQueeney v.	522
Chicago, M. & St. P. Ry. Co., Paul v.	224
Chicago, M. & St. P. Ry. Co. v. Snyder.....	532
Chicago & N. W. Ry. Co., Warner v.	159
Chicago, R. I. & Pac. Ry. Co., Brown v.	280
City Council of Marion v. Cedar Rapids & M. Ry. Co.	259
City of Cedar Rapids, Coe College v.	541
City of Fort Dodge, Wil- ber v.	555
City of Oskaloosa, Sheriff v.	442
Clarke County, Perry v....	96
Cleaver v. Mahanke, et al..	77
Coad, et al., Wood v.	111
Coe College v. City of Cedar Rapids	541
Cole v. Johnson	667
Cole, Smeaton v.	368
Collins v. Padden.....	381
Condon v. Des Moines Mut. Hall Assn.....	80
Costello v. Pomeroy.....	213
Cox v. Burnham.....	43
Creamery Package Mfg. Co. v. Benton County Cream- ery Co.....	584
Crosby & Henshaw, Ha- worth v.	612
Crowell, Dickinson v.	254

Cunningham, et al., Shinn v.	383	Hendryx v. Evans & Moore	310
Curd v. Wisser, Ex'r.....	743	Holden, et al., Brown v....	191
D		Home Insurance Co., Born v.	299
Darr v. Darrow, et al....	29	Hoot, State v.....	238
Darrow, et al., Darr v....	29	Hopkins v. Antrobus, Ex'r...	21
Davis, Ex'r., et al., Milner, et al., v.....	231	Hopley, Hunt v.....	695
Des Moines Mut. Hail & Cyclone Ins. Assn., Barrett v.	184	Hopwood v. McCausland...	218
Des Moines Mut. Hail Assn., Condon v.....	80	Hunt v. Hopley.....	695
Dickinson v. Crowell.....	254	I	
Donahue, State v.....	154	Inc. Town of Clarion, Bell v.	332
Dunning v. Bailey, et al....	730	Inc. Town of Greenfield, Burget v.	432
Dunton v. McCook, et al....	444	Inc. Town of Larchwood, Kirchner v.	578
E		Inc. Town of Paton, Ceprley v.	559
Ehmke, League v.....	464	In re Carter.....	215
Ellis, et al. v. Newell, et al.	71	In re Cummings' Estate....	421
Elwood, Mallory Commission Co. v.....	632	In re Frahm's Estate v. Steffen, Guardian	85
Equitable Loan Co., et al., Winegardner v.....	485	In re Gray.....	144
Evans & Moore, Hendryx v.	310	In re Intoxicating Liquors..	680
Everts v. Everts, et al.....	40	Insell v. Kennedy.....	234
F		Iowa Central Bldg. & Loan Assn. v. Merchants' & Bankers' Fire Ins. Co....	530
First Nat'l Bank of Sioux City, Millsbaugh Laundry v.....	1	Isherwood, Borden v.....	677
First Nat'l Bank of Sioux City, Wright & Hubbard v.	160	J	
Flower, Stover v.....	514	Jelly v. Muscatine City & County Mut. Aid Soc. et al.	689
G		Johnson Bros. v. Carter & Co.	355
Gallaher, Kilmer v.....	575	Johnson, Cole v.....	667
German Ins. Co. of Freeport, Vincent v.....	272	K	
Germinder v. Machinery Mut. Ins. Ass'n.....	614	Kennedy, Insell v.....	234
Gillett, Kiefer v.....	107	Kiefer v. Gillett.....	107
Gleason, Streeter v.....	703	Kilmer v. Gallaher.....	575
Glucklick, Kuh, Nathan & Fisher Co. v.....	504	King v. Nelson, et al.....	606
Gormley, Young v.....	372	Kirby, State v.....	26
H		Kircher v. Inc. Town of Larchwood	578
Halley v. Tichenor.....	164	Kirsher, et al. v. Kirsher, et al.	337
Hamilton v. Mendota Coal & Mining Co.....	147	Koenen, Luke, Adm'r. v....	103
Hamilton v. Smith.....	93	Kringle v. Rhomberg.....	472
Hartenbower, et al., Robertson v.	410	Kuh, Nathan & Fisher Co. v. Glucklick	504
Hawarth v. Crosby & Henshaw	612	L	
		Lambert, McCormick Harvesting Machine Co. v....	181
		Lamm Bros., Reeves & Co. v.	283
		Lampman v. Bruning.....	167

League v. Ehmke	464	America, Ross v.....	692
Lemars Bldg. & Loan Assn. v. McLain	527	Montgomery v. Mann.....	609
Leonard v. Wakeman, et al.	140	Murphy, Sleeper v.....	132
Ley v. Metropolitan Life Ins. Co.	203	Muscatine City & County Mut. Aid Soc. et al., Jelly v.....	689
Long & Camp, Wisecarver v.	59	Muscatine County, Schmidt v.	267
Lord, Owen & Co. v. Wood.	303	N	
Lucas v. White.....	736	National Cracker Co., She- beck, Adm'r. v.....	414
Luckhart v. Luckhart, et al	248	Nelson, et al., King v.....	606
Luke, Adm'r. v. Koenen....	103	New Ind. School Dist. of Kelly, et al., Rural Ind. School Dist., No. 10 v....	119
Lutz v. Anchor Fire Ins. Co.	136	Newcomb v. Ogden Plow Co., et al.....	570
M		Newell, et al., Ellis, et al. v.	71
McCausland, Hopwood v... 218		Nourse, et al., v. Weitz, et al	708
McCook, et al., Duntun v.. 444		Novak, et al. v. Pitlick....	286
McCormick v. McCormick Harvesting Machine Co..	593	O	
McCormick Harvesting Ma- chine Co. v. Lambert....	181	Officer, Adm'r. v. Officer, et al.	389
McCormick Harvesting Ma- chine Co., McCormick v..	593	Ogden Plow Co., et al., New- comb v.....	570
McDowell, Augustine v....	401	Omaha & Council Bluffs Ry & Bridge Co., Branz v... 406	
McGavic, et al., Ripley v... 52		P	
McLain, Lemars Bldg. & ..Loan Ass'n v.....	527	Padden, Collins v.....	381
McQueeney v. Chicago, M. & St. P. Ry. Co.....	522	Paul v. Chicago, M. & St. P. Ry. Co.....	224
Machinery Mut. Ins. Ass'n, Germinder v.....	614	Percival v. Yousling.....	451
Mahanke, et al., Cleaver v.. 77		Perry v. Clarke County....	96
Mallory Commission Co. v. Elwood	632	Pitlick, Novak, et al. v....	286
Mann, Montgomery v.....	609	Pomeroy, Costello v.....	213
Mason City & Fort Dodge Ry. Co., Wormely v.....	684	Powers v. Benson, et al....	428
Mead, Wragg & Son v.....	319	R	
Mendota Coal & Mining Co., Hamilton v.....	147	Redmond, Mayor, Cedar Rapids & M. Ry. Co. v..	601
Mercantile Realty Co. v. Stetson, et al.....	324	Reeves & Co. v. Lamm Bros.	283
Merchants' & Bankers' Fire Ins. Co., Iowa Central Bldg. & Loan Ass'n v....	530	Rhomberg, Kringle v.....	472
Metropolitan Life Ins. Co., Ley v.....	203	Riley v. Bell.....	618
Meyer v. Baird, et al.....	597	Ripley v. McGavic, et al... 52	
Millsbaugh Laundry Co. v. First Nat'l Bank of Sioux City	1	Roberts, Battles v.....	748
Milner, et al. v. Davis, Ex'r., et al.....	231	Robertson v. Hartenbower, et al.....	410
Minneapolis & St. L. Ry. Co., Carver v.....	346	Ross v. Modern Brother- hood of America.....	692
Modern Brotherhood of		Rowe v. Rowe, et al.....	17
		Rural Ind. School Dist. No. 10 v. New Ind. School Dist. of Kelly, et al.....	119

S

Samms & Scott, Wales v..	293
Sachara v. Town of Manilla	562
Schick, et al. v. Stuhr.....	396
Schmidt v. Muscatine County	267
Selensky v. Chicago, G. W. Ry. Co.	113
Shebeck, Adm'r. v. National Cracker Co.	414
Sheriff v. City of Oskaloosa	442
Shinn v. Cunningham, et al	383
Slattey v. Slattey, et al..	717
Sleeper v. Murphy.....	132
Smeaton v. Cole.....	368
Smith, Hamilton v.....	93
Smith & Cochran v. Thomas	12
Snyder, Chicago, M. & St. P. Ry. Co. v.....	532
Southwick, Stanley v.....	480
Spears, Campbell v.....	670
Stanley v. Southwick.....	480
State v. Donahue	154
State v. Hoot	233
State v. Kirby.....	26
State v. Swift.....	8
State v. Williams.....	36
Steffen, Guardian, In re Frahm's Estate v.....	85
Stetson, et al., Mercantile Realty Co. v.....	324
Stover v. Flower.....	514
Streeter v. Gleason.....	703
Stuhr, Schick, et al. v.....	396
Swift, State v.....	3
Syck v. Bossingham	363

T

*Thomas, Smith & Cochran v	12
----------------------------	----

Tichenor, Halley v.....	164
Town of Manilla, Sachra v.	562
Town of Rockwell City, Burge v.....	495

V

Vincent v. German Ins. Co. of Freeport	272
Voss, Wilken v.....	500

W

Wakeman, et al., Leonard v.	140
Wales v. Samms & Scott..	293
Warner v. Chicago & N. W. Ry. Co.....	159
Waterloo & C. F. R. T. Co., Ames, Adm'r. v.....	640
Weitz, et al., Nourse, et al. v.	708
White, Lucas v.....	736
Wilber v. City of Fort Dodge	555
Wilken v. Voss	500
Williams, State v.....	36
Winegardner v. Equitable Loan Co. et al.....	485
Wisecarver v. Long & Camp	59
Wisser, Ex'r., Curd v.....	743
Wolfson v. Allen Bros. Co..	455
Wood v. Coad, et al.....	111
Wood, Lord, Owen & Co. v.	303
Wormely v. Mason City & Fort Dodge Ry. Co.....	684
Wragg & Son v. Mead.....	319
Wright & Hubbard v. First Nat'l Bank of Sioux City.	160

Y

Young v. Gormley.....	372
Yousling, Percival v.....	451

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
Supreme Court
OF THE
STATE OF IOWA.

AT
DES MOINES, JANUARY TERM, A. D. 1903.

AND IN THE FIFTY-SEVENTH YEAR OF THE STATE.

MILLSPAUGH LAUNDRY V. FIRST NATIONAL BANK OF SIOUX
CITY, Appellant.

Good Will: DEFINED. The good will of a business is defined to
1 be "the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity."

To What Attaches. Good will is not necessarily connected with
2 the premises where the business is carried on, but is identified with the enterprise itself.

Conversion of Good Will: USE OF NAME. The name under which
3 a laundry business is run is connected with its good will, but where a mortgage covering all of the tangible property in

NOTE—The figures on the left of the syllabi refer to the corresponding figures placed on the margin of the case at the place where the point of the syllabus is decided.

connection with a laundry operated under the name "Mills-
pough Laundry" is legally foreclosed and the property pur-
chased by the mortgagee and the business afterwards conducted
by it in the same place under the title "National Laundry,
formerly owned by Millspaugh", there is no conversion of the
good will by such use of the name.

Same: CONTINUING THE BUSINESS. Continuing the business at the
4 same place by the purchaser at a mortgage sale of the tangible
property used in connection therewith, and soliciting the
customers of the former proprietor, do not constitute a con-
version of the good will.

Appeal from Woodbury District Court.—HON. J. F. OLIVER,
Judge.

THURSDAY, APRIL 9, 1903.

ACTION for the conversion of the name and good will
of plaintiff. The jury allowed \$355 damages, less a counter-
claim of \$105 for rent, and judgment was rendered against
defendant for \$250. The defendant appeals.—*Reversed.*

Irwin & Hultberg for appellants.

L. M. Kean and *Charles A. Dickson* for appellee.

LADD, J.—One Millspaugh owned the machinery, tools,
fixtures, and wagons used in operating a laundry in Sioux
City, and in 1898 sold the same to E. H. Mann, from whom
he took a note for \$4,000 of the purchase price, secured by
a chattel mortgage on the property. These papers were
assigned to the defendant. Mann does not appear to have
been successful in the venture, and in November of the
same year surrendered the plant to Millspaugh. There-
upon the plaintiff company was organized, with a nominal
capital stock of \$4,500, divided into shares of \$100 each,
though but three were issued, for which no money was
paid. Without capital or property, it took possession,
under an arrangement with Millspaugh, not disclosed,

November 19, 1898, and operated the plant until September 19, 1899, at a loss of about \$3,000, when the property covered by the mortgage was seized thereunder by defendant, and disposed of ten days later at foreclosure sale. Aside from a few articles used in operating the plant, valued at \$42, which has been paid, this mortgage covered all the tangible property, in the possession of the company and connected with the laundry, even to the sign "Millsaugh Laundry," over the door, and the wagons stamped with the same sign. The good will of plaintiff was not included, however, as the corporation was organized after the instrument was executed. Manifestly, that was connected with the location and the operation of the plant, and was subject to any interference which might result from the lawful exercise of the power conferred by the execution of the mortgage. Of the mortgagee's rights the company was charged with notice, and, as the foreclosure proceedings were regular and legal, the defendant was guilty of no wrong in seizing and selling all the property. For so doing the bank is not criticised. The fault found with it is that in accomplishing this object it also converted to its own use the name and good will of the plaintiff. Our inquiry must be directed, then, to ascertaining precisely in what plaintiff's good will consisted, and the manner in which this, with its name, was made use of by the defendant. Though intangible in their nature, these are esteemed by the law as valuable, transferable, and proper subjects for the protection of the courts.

Some difficulty has been experienced in determining precisely what "good will" really is. Lord Eldon thought it "no more than the probability that the old customers

1. ^{Good will:} ^{defined.} will result to the old place." *Crutwell v. Iye*, 17 Ves. 335. In *Churton v. Douglas*, 1 Johns. Eng. Ch. 174, this definition was pronounced too narrow, and good will was held to include every positive advantage acquired, arising out of the business of the old

firm, whether connected with the premises where it was carried on, the name of the late firm, or with any other matter carrying with it the benefit of the business of the old firm. This, again, was declared too limited in *Slack v. Suddoth*, 102 Tenn. 375 (52 S. W. Rep. 180, 45 L. R. A. 589, 73 Am. St. Rep. 881), when applied to the good will of a partnership to practice a profession, since it leaves out of view the advantage to be gained from professional standing and reputation of the partners themselves, which constitutes the principal feature of value in such partnerships; the court saying that "no forced sale or transfer can be made of a good will when it is based upon professional reputation and standing or upon business connections"; adding that "good will implies something gained by consent, not something realized by force or coercion." In *Vonderbank v. Schmidt*, 44 La. Ann. 264 (10 South. Rep. 616, 32 Am. St. Rep. 336, 15 L. R. A. 462, containing a valuable note), the authorities are reviewed, and many of the definitions found in the books quoted, with the conclusion "that good will is an advantage or benefit which is acquired by a business establishment beyond the mere intrinsic value of the capital stock; that it is the general public patronage and encouragement which a business receives from its customers on account of its local position; that it is the subject of price and value, and of bargain and sale, though intangible." This definition seems to have been extracted from *England v. Downs*, 6 Beav. 269, where it is described to be "the advantage or benefit which is acquired by an establishment, beyond the mere value of the capital stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity." This has the merit of being so comprehensive as to cover almost every conceivable case, and, with unimportant variations, has been quite generally

approved. See Story on Partnership, section 99; *Smith v. Gibbs*, 44 N. H. 343; *Bell v. Ellis*, 33 Cal. 624; *Boon v. Moss*, 70 N. Y. 473; *Angier v. Webber*, 14 Allen, 221 (92 Am. Dec. 748); *Morgan v. Perhamus*, 36 Ohio St. 522 (38 Am. Rep. 607); *Rice v. Angell*, 73 Tex. 350 (11 S. W. Rep. 338, 8 L. R. A. 769); 14 Am. & Eng. Ency. of Law, 1085. See, also, *Williams v. Farrand*, 88 Mich 473 (50 N. W. Rep. 446, 14 L. R. A. 161).

It is to be observed that good will, though often connected with the premises on which the business or trade is conducted, is not necessarily so. See *England v. Downs*,

2. To what
attaches.

supra, and *Jurne's Succession*, 21 La. Ann. 391, where it was said to be incident to the stock and license. And so with a laundry doing work for customers out of town, or even in the city. They ordinarily know and care nothing concerning the place of its business within the corporation. The reputation or the celebrity of the character of the work done, or the manner of doing it, may be the only inducement. But while not necessarily incident to the location, it is necessarily connected with the enterprise carried on; and this is all that was held in *Moorehead v. Hyde*, 38 Iowa, 382, where the court observed that "the good will of a trade or business may be the subject of bargain and sale, when connected with any specific stock in trade, or with some valuable secret of trade, or with a well established business." An examination of the authorities already cited will illustrate the extent to which the courts have gone in protecting good will, whether retained by those responsible for its growth, or in the keeping of a transferee.

The name, too, of an established enterprise, is regarded as of importance, and the right to its exclusive use generally recognized. The *Iowa Seed Co. v. Dorr*, 70

3. CONVERSION
of good will:
use of name.

Iowa, 481; *Williams v. Farrand*, *supra*; *Vonderbank v. Schmidt*, *supra*; *Fish Bros. Wagon Co. v. La Belle Wagonworks*, 82 Wis. 546 (52 N. W. Rep.

595, 16 L. R. A. 453, 33 Am. St. Rep. 72); *Armington v. Palmer*, 21 R. I. 109 (42 Atl. Rep. 308, 43 L. R. A. 95, 79 Am. St. Rep. 736). In a case like this the name is not in the nature of a trademark, and of necessity is closely connected with the good will. It is the designation by which the company is known and addressed by its patrons. And the good will is the probability, regardless of its foundation, that the patronage of these will be continued. No claim is made that plaintiff was improperly deprived of the premises in which the laundry was operated. Indeed, as a counterclaim for rent was allowed by the court, we take it that its occupancy was rightly terminated. How, then, was this bank able to seize these intangible things and convert them to its own use? As already observed, it had the right to take the possession of all the tangible property in the keeping of the company, and this of necessity terminated the business. Thereby it was deprived of the machinery and tools essential to carry on the enterprise. But all this was incidental to the power conferred by the mortgage to which the plaintiff's rights were subject. No liability, then, accrued for any injury to the good will resulting from the termination of its business, and seizing the premises in which conducted. Nor is defendant shown to have appropriated the company's name. It continued the laundry, making use of stationery headed, "National Laundry, formerly owned by Millspaugh." That it had been so owned is not questioned. The description was accurate. Possibly Millspaugh might have objected to such use of his name if it in some way interfered injuriously with an enterprise of his own. Plaintiff has not proven an exclusive right to the use of his name in connection with the laundry business. Moreover, if it had been, there was no evidence of any injury whatever to any enterprise or business in which it was engaged.

There is left, then, merely the probability that the customers might continue their patronage. Was this

appropriated by defendant? No more than in so far as
 1. SAME: continuing the business. occasioned by the continuance of the business
 at the old stand, which, as we have seen, it
 had the right to do. There is no reason why it might not
 freely compete for patronage, and it was under no obligation,
 by contract or otherwise, to refrain from soliciting
 the customers of the plaintiff. Whether it wrongfully
 seized a list of plaintiff's patrons, we have no means of
 knowing, or of the value of such list if we did know, and
 therefore we shall not determine whether this would be
 actionable. True, one witness says it took possession of
 certain books and files containing such lists, but whether
 these were covered by the mortgage was not disclosed.
 The same witness also testified that the market value of
 the name, good will, and business of the plaintiff as a
 going concern at the time seized (insisting on cross-examination
 that all were estimated together) was from \$1,200
 to \$1,500, and that such value of the name and good will
 ten days later was from \$700 to \$1,000. Our curiosity is
 not gratified by any information as to the basis of this last
 estimate. Another was asked, after describing the gross
 earnings, "what the good will of the trade would have
 been—a business of that kind would have been?" and
 responded, "\$1,500 to \$2,000." The only other witness
 estimated the value of the good will at about the same
 amount. On no tenable theory of the case does this evidence
 furnish the basis for the measure of damages which
 could be allowed, for, in any event, the defendant was
 not liable for the destruction of the business, nor for the
 good will, in so far as it may have been injured thereby,
 or by occupation of the premises by defendant; and, as
 seen, it is not in a situation to complain of the use of Mills-
 paugh's name. The defendant's liability, if any exists, is
 limited to damages occasioned by the seizure of the list of
 patrons, and in the absence of proof thereof, or of the

damages, if any, resulting therefrom to plaintiff, and any argument pertaining to the legal questions involving the subject had best be postponed until properly raised by the record.—REVERSED.

STATE OF IOWA V. GEORGE SWIFT, Appellant.

Burglary: POSSESSION OF PROPERTY: INSTRUCTION. Where certain

1 goods were stolen from a building by breaking and entering, proof of subsequent possession without reasonable explanation will support a conviction for the crime of breaking and entering, and an instruction embodying this rule is not open to objection.

Proof of Burglary: CIRCUMSTANTIAL EVIDENCE. It is not necessary

2 for the state to produce a witness who actually saw the property taken at the time of the breaking and entering. This fact like any other can be proved by circumstantial evidence, and where the circumstances shown are inconsistent with any other rational hypothesis than that the building was broken and entered with intent to steal and that the goods were stolen by breaking and entering, there should be a conviction on a charge of breaking and entering.

Possession as Evidence of Breaking and Entering: INSTRUCTION.

3 The court instructed that the possession of the stolen goods, if unexplained, was sufficient to warrant the conclusion that the person having the possession broke and entered the building, unless the evidence left a reasonable doubt whether defendant might not have come "honestly" into such possession. *Held*, the word "honestly", as used, could have no reference to obtaining goods in any other dishonest way than by breaking and entering, and therefore not prejudicial.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

THURSDAY, APRIL 9, 1903.

THE charge against defendant was that, with intent to commit larceny, he broke and entered a certain warehouse in the town of Avoca, which was used for the storage of beer. Verdict for the state. and defendant appeals from the sentence imposed.—*Affirmed*.

120	8
122	5
120	8
144	287

Roscoe C. Barton and A. L. Preston for appellant.

Chas. W. Mullan, Attorney General, and *Chas. A. Van Vleck*, Assistant Attorney General, for the State.

McCLAIN, J.—The contention for the defendant is that he was convicted on evidence that a keg of beer taken from the warehouse in question was found in his possession soon after the building was broken and entered, and complaint is made of the instructions as to the effect which the jury might give to such evidence. This question has frequently been before the court, and in the recent case of *State v. Brundige*, 118 Iowa, 92, the previous decisions are referred to. It is not necessary, therefore, to again cite and discuss the previous holdings of this court as to the effect of evidence of recent possession of stolen property as tending to establish the guilt of the person having such possession, when placed on trial for the crime of burglary, committed as a part of the same transaction in which the property is charged to have been stolen. It is sufficient to say that the court is unequivocally committed to the position that, where it appears that certain goods have been stolen from a building by breaking and entering, the proof of the subsequent possession, without reasonable explanation that the goods were obtained otherwise than in the commission of the crime of breaking and entering, will support a conviction for the latter crime. In some of the cases which we have heretofore considered, objection has been taken to the use in such connection of language indicating that proof of subsequent possession gives rise to the presumption of guilt, which it is for the defendant to overcome; but such an objection is not tenable to the instructions given in this case, by which the jury were told that "the fact of such possession, if unexplained, is sufficient to warrant the conclusion that the person having

1. BURGLARY:
possession of
property:
instruction

such possession is the person who broke and entered the building," unless the evidence showing such possession leaves a reasonable doubt whether the defendant may not have come into possession of the goods otherwise than by breaking and entering. In some of the cases, also, the objection has been made that the instruction did not limit the effect of subsequent possession to a case where it was shown that the goods were obtained by means of the breaking and entering with which the defendant is charged. But here, again, the instructions are free from any possible complaint. They relate to a case where "property stolen from a building by breaking and entering such building is, soon after the larceny, found in the possession of such person." We cannot discover that the instructions in the case before us are open to any of the objections which have been raised in other cases of like character coming before us for consideration.

It is further urged, however, that, even if the instructions were correct, there was no evidence to sustain a conclusion on the part of the jury that the keg of beer found in defendant's possession had been obtained from the building in question by breaking and entering. It is certainly not necessary that the state be able to produce witnesses who actually saw the goods taken at the very time the breaking and entering were committed. Circumstantial evidence may establish this fact as well as any other fact in the case. When the jury are told that this essential fact must be found from the evidence, and they do find that the circumstances are inconsistent with any other rational hypothesis than that the building was broken and entered with the intent to steal the goods, and that such goods were stolen by breaking and entering, we see no reason why a conviction of the defendant should not be sustained, if there are circumstances which can reasonably be considered as supporting such a conclusion. That there are

2. PROOF of
burglary:
circumstan-
tial evidence.

such circumstances in this case is beyond question. The whole story of defendant and the person who was jointly indicted with him for the same crime—that they met a tall, slim man and a short, thick man, who although entire strangers to them, invited them to go and participate in the drinking of a keg of beer, and produced a keg of beer from a place near where the warehouse which was broken and entered was situated, and after carrying the keg to a suitable place, and enjoying a small portion, only, of the contents of the keg, left it with the defendant and his accomplice to finish—is too preposterous to be entitled to credence; and the fact that such a story was told, ingeniously, as it seems, to fit into the necessities of the case, might well be considered by the jury as pointing to no other conclusion than that the keg of beer which was found in the possession of defendant and his accomplice had been stolen from the warehouse by breaking and entering.

Error is assigned in the giving of the instruction relating to the subsequent possession of the stolen goods, in that the jury were told that the fact of such possession, if unexplained, was sufficient to warrant the conclusion that the person having such possession was the person who broke and entered the building, “unless the evidence showing such possession leaves a reasonable doubt whether such person may not have come honestly into such possession”; the objection being to the word “honestly.” If there were anything in the evidence to indicate that this word could possibly have reference to the obtaining of the beer in any other dishonest way than by breaking and entering, there would be some force in the objection. But it is perfectly clear that it has reference to the question whether the beer was obtained by breaking and entering, or not, and the jury could not have been misled. We are constrained to say, however, that the expression is an unfortunate one, and,

3. Possession
as evidence
of breaking
and entering:
instructions:

under some circumstances, might be misleading and prejudicial. But in the present case there was no possibility of any misconception, and we hold that while the use of the word "honestly" in such connection is not to be commended, and may sometimes constitute prejudicial error, it was not prejudicial error in this case.

The other assignments of error argued by counsel for defendant do not require separate or extended discussion. There was an instruction relating to the evidence as to an alibi, which was correct, as far as it went, and was sufficient to guide the jury in the consideration of such evidence. No further instruction on that question having been asked, there was no error committed in that respect. The rulings on the admission of evidence which are complained of were right, and, on the whole record, we are satisfied that the judgment of the trial court should be sustained.—
AFFIRMED.

120	12
123	96

W. A. SMITH AND S. H. COCHRAN, Appellants, v. ELIZABETH
THOMAS AND J. J. THOMAS.

Action to Quiet Title: FAILURE TO PROVE TITLE. In an action to quiet title, where neither party shows any right in or title to the land, but it appears that title was quieted in plaintiff as to a part thereof in a former action, it is not error to deny plaintiff further relief.

Appeal from Harrison District Court.—HON. W. R.
GREENE, Judge.

THURSDAY, APRIL 9, 1903.

THE plaintiffs allege ownership of thirty-three and one-third acres of land on the east side of the lands occupied by R. L. Golden, specifically described in a plat forming a part of the decree in *Smith v. Miller*, reported in 105 Iowa, 688, that the same is immediately east of the

middle thread of the abandoned bed of the Missouri river; and they ask that title thereto and to other lands east of said middle thread be quieted in them. The defendant Elizabeth Thomas answered by averring that she acquired the tract represented on said plat from Golden, and is in possession thereof; also that plaintiffs are estopped from claiming any interest therein. The court found the land to be that involved in the case mentioned, and that on the 19th day of November, 1894, Golden conveyed to S. H. Cochran and Jesse T. Davis, under whom plaintiffs claim the east thirty-three and one-third acres, and quieted title thereto and to other lands now occupied by Thomas in Iowa in plaintiffs. Both parties appeal, the appeal of plaintiffs being first perfected.—*Affirmed.*

S. H. Cochran and J. S. Dewell for appellants.

Frank Tamisiea and Roadifer & Arthur for appellee.

LADD, J.—In *Smith v. Miller*, 105 Iowa, 688, the plaintiff claimed the lands, of which that now in controversy is a part, as accretion to lots lying between the meander line of the Missouri river as located by the Davis survey in 1858 and that of the survey of 1851. The intervenor claimed them as accretion to his land bounded by the meander line of the original survey of 1851. Each prayed that title be quieted in him. The tracts occupied by the respective defendants had not then been surveyed, and they asked no affirmative relief. Later the several tracts seem to have been surveyed, and an accurate plat prepared and made a part of the decree finally entered. One of these was then occupied by Golden, who conveyed it to the defendant Elizabeth Thomas. Controversies as to other tracts have been adjusted since this appeal was taken. In compensation for services as attorneys in *Smith v. Miller*, *supra*, Golden conveyed to his attorneys, S. H. Cochran and Jesse T. Davis, all his right to and interest

in "the following described premises situated in Harrison county and state of Iowa, but west of the meander line of the United States survey of 1858, thirty-three and one-third acres off the east side of the lands occupied by R. L. Golden, known as cutoff land, and specifically set forth in the body of land on plat and field notes of survey, which is made a part of the decree in case of W. A. Smith vs. Joe Miller et al." This deed was recorded, and the plaintiffs now have whatever title Davis and Cochran acquired under it, and seek in this action to have title quieted as against the adverse claims of Elizabeth Thomas and her husband, J. J. Thomas. In granting relief, the district court expressly found that the land in controversy was the east thirty-three and one-third acres of that shown on the plat forming part of the decree in *Smith v. Miller, supra*, as being in the possession of Golden, and that it is in Harrison county, Iowa, and quieted title thereto in plaintiffs. But the court went further and held that all the lands involved in the former case were in Iowa, and quieted title in plaintiffs to "all that portion of the abandoned Missouri river bed, east of the middle thread thereof, adjacent to fractional lots 7, 8, and 9, section 5, Tp. 80, range 45, Harrison county."

The decree in *Smith v. Miller*, though introduced in evidence, is not set out in the abstract, and probably we should accept the assertion of plaintiffs, not denied, that such decree especially found all the lands occupied by defendants therein to be situated in Nebraska, though the issues therein would seem merely to involve the claims of the intervener and plaintiffs to land beyond the meander of the Davis survey, and the appropriate entry to be no more than a dismissal of the petitions. Conceding, however, that the court went further and located the tracts, and then definitely fixed their boundaries, though beyond its jurisdiction, we do not see how this aids plaintiffs in their contention that they are entitled to all land up to

the middle thread of the abandoned river bed. Their contention seems to be that as the court, in *Smith v. Miller*, located defendant's land in Nebraska, and her grantor conveyed the east thirty-three and one-third acres of it to their grantors, this must have been west of the middle thread of the abandoned river bed; and as, in the instant case, the court found all the land in dispute in Iowa, none of the tract of Thomas can be east of the said middle thread, and therefore, under the decree herein rendered, awarding plaintiffs all land east of the river, not included in the plat forming part of the decree in *Smith v. Miller*, as occupied by defendants therein, they are entitled to all the land on the Iowa side, or east of the middle thread, and hence that the court erred in allowing defendant Thomas to retain all east of the middle thread, save thirty-three and one-third acres, now in her possession. This is the contention as we understand it, though without map or a definite statement from counsel, some difficulty has been experienced in extracting it from the record. There are several sufficient reasons for not making the defendant the victim of this sort of jugglery with the court's decrees, and we will state them in the order in which they occur to us.

In the first place, plaintiff's deed called for the east thirty-three and one-third acres of the land occupied by Golden, as shown on the plat in *Smith v. Miller*, and that is precisely what the decree of the district court awarded them. Their deed did not describe the land as in Iowa or Nebraska, but merely as being west of the meander line of the Davis survey, and necessarily was in or beyond the abandoned river bed. The entire tract was pointed out and definitely traced on this plat, regardless of the state in which located, and this tract is definitely identified as the one now actually occupied by Thomas. The land is the same notwithstanding the alleged divergent views of the different courts with respect to state

boundaries, and the land itself is the subject of the litigation. Its location on the map is of importance only in so far as that may aid in determining the rights of the respective parties thereto. Moreover, if the land was formerly declared to be in Nebraska, the contention of the plaintiffs may be accepted (without deciding it) that that was in a suit between different parties, and not binding on these litigants. Lastly, and conclusively, the plaintiffs are not in a situation to complain if the decree does erroneously find some of defendant's land in Iowa, and allows her to retain a part of the abandoned river bed east of the middle thread. That she is in possession of that occupied by Golden is not disputed, nor do we think its location in the abandoned river bed put in issue.

In the first division of their petition, plaintiffs described the thirty-three and one-third acres covered by the deed as "cut-off land" noted in the plat heretofore mentioned, and "immediately east of the middle thread of the abandoned river bed." In the second division, the land is described by metes and bounds so as to include everything between the middle thread of the said abandoned bed and the Davis meander line. The defendant's tract, with others, is alleged to be west of it. All of it is mentioned as though made by avulsion, as decided in *Smith v. Miller*. The findings of that case are treated throughout as the basis of their claim. There is no allegation that the land was added to plaintiffs' lots by accretion or reliction, and such an inference is precluded by the wording of the pleading. If so, then from whence did plaintiffs derive the title to any land in the abandoned river bed save under the deed from Golden? If the land was that of the state, as seems likely from *Holman v. Hodges*, 112 Iowa, 714, and *East Omaha Land Co. v. Hansen*, 117 Iowa, 96, or swamp land, as alleged in the petition, title was not shown to have passed to plaintiffs. See *Ogden v. Buckley*, 116 Iowa, 352; *Carr v. Moore*, 119 Iowa, 152;

Young v. Charnquist, 114 Iowa, 116. Having neither title nor possession to any of the land between the Davis meander line and the middle thread of the abandoned river bed, save under deeds from defendants or their grantors, they are not in a situation to complain of the court's action in refusing to disturb those who have been in actual possession for many years. It must not be understood that we are saying that title to the thirty-three and one-third acres was rightly quieted. Upon what theory relief could have been granted in respect to land in which neither party had any right or title need not now be considered, as the point is not raised. We simply hold there was no error in denying relief other than granted.

II. The defendant pleaded failure of the consideration in the deed from Golden to Cochran and Davis. This division of the answer was stricken on motion. It is so apparent, from the facts pleaded, that the defense was not available to Thomas, that any discussion of the matter is unnecessary.—AFFIRMED.

ANNA IDA ROWE, Appellant, v. MAY IRENE ROWE, *et al.*

Wills: REVOCATION. Prior to the adoption of the Code of 1897,

- 1 the birth or adoption of a child after the making of a will and prior to the death of the testator operated to revoke the will.

Construction of Will: LIFE ESTATE: PROVISIONS FOR CHILDREN.

- 2 The testator devised all his property to his wife for life with "full use, management, control and disposal for her use, comfort and support so long as she shall live", and at her death the remainder to their children. *Held*, that the widow took a life estate and that the disposition of the remainder did not constitute a substantial support for the child.

Appeal from Dallas District Court.—HON. J. H. APPLE-
GATE, Judge.

THURSDAY, APRIL 9, 1903.

VOL. 120 IOWA.—2.

120	17
128	428

120	17
130	613

120	17
139	227
140	285

SURT in equity for the construction of the will of Martin Rowe, deceased, and to authorize plaintiff to sell certain land of which testator died seised. Defendant May Irene Rowe appeared and answered, pleading that the will of Martin Rowe was revoked by the birth of a child after the execution of the will, and before the testator's death. The trial court overruled a demurrer to this count of the answer, and the plaintiff appeals.—*Affirmed.*

White & Clarke for appellant.

Dale & Harvison for appellees.

DEEMER, J.—The material parts of the will in question, which was executed on [the 17th day of January, 1894, read as follows:

"1st. After the payment of all my just debts and funeral expenses I give, devise and bequeath unto my beloved wife, Anna Ida Rowe, all of my property and effects of whatsoever kind whether real or personal and wheresoever situated. To have and to hold the same during the period of her natural lifetime. She to have full use, management, control and disposal of the same for her use, comfort, and support so long as she shall live.

"2d. In case no children are born to my said wife and myself then all my property of whatsoever kind remaining at the time of the death of my said wife, shall be divided equally between my parents and her parents, share and share alike. 'In case there are living children at the time of the death of my said wife, then all property remaining shall descend to them share and share alike.'"

Testator died December 7, 1898, and plaintiff is his widow. Defendant May Irene Rowe is a daughter. She was born December 28, 1897. She pleads that the will was revoked by her birth, and that she is entitled to two-thirds of her father's estate. Code, section 3276, provides,

in substance, that the subsequent birth of a legitimate child to the testator before his death will operate as a revocation of his will. This statute was enacted after the making of the will, but before the birth of the child. As the child was born after the Code provision went into effect, the result of such birth on the prior will must be determined with reference to the law as it existed at that time. Ordinarily a will speaks from the time of the testator's death, and, until some rights intervene, the legislature may say what facts will revoke it. The present act of the legislature went into effect in October of the year 1897, and defendant was not born until the month of December in that year. But whether this be true or not, the rule which prevailed in this state before the adoption of the present Code was to the effect that the birth or

1. REVOCATION
of will.

adoption of a child subsequent to the making of a will, and before the testator's death, alone operated as an implied revocation of his will. *McCullum v. McKenzie*, 26 Iowa, 510; *Carey v. Baughn*, 36 Iowa, 540; *Negus v. Negus*, 46 Iowa, 487; *Fallon v. Chidester*, 46 Iowa, 588; *Alden v. Johnson*, 63 Iowa, 125; *Milburn v. Milburn*, 60 Iowa, 411; *Hilpire v. Claude*, 109 Iowa, 159. The Code commission, which recommended the insertion of the sentence quoted into our present Code, said in its report (page 47, section 7), "The last clause states a rule which has been announced by the decisions of the Supreme Court."

Appellant's counsel, admitting the rules thus far announced, contend that they do not apply when there has been a recognition of the child, and substantial provision made for it in the will. They further

2. CONSTRUCTION
of will:
life estate:
provision for
children.

contend that the statute is simply declaratory of the common law, or of the law as it existed in this state prior to the adoption of the Code, and that it should be construed with reference to the then recognized exceptions to the general rule. Should we accept these

postulates, it by no means follows that the appellant's conclusion is correct. She is contending that defendant took nothing under the will, that the clauses we have quoted gave her an estate in fee simple, and that she has power to sell and dispose of the estate without authority of court, and without being held to account for its proceeds. This claim is doubtless without support, but it gives us some light in arriving at a correct solution of the problem involved. The widow has but a life estate under the will of her former husband, with limited power of disposition for her use, comfort, and support so long as she shall live. Under this power she might sell the entire property during her life for support, and thus deprive the child of any right to or interest therein. Indeed, all the child is given is a remainder after a life estate, and this remainder is subject to disposition under the power given in the will. Is this a substantial provision for the child? We think not. While there is a conflict in the authorities on this proposition, we are of opinion that such a devise as is found in this will does not amount to a substantial provision for a child born after the execution of the will. Defendant was of tender years, and was not provided for during that period of her life when in need of support and education. She may never receive anything of her father's estate. It is given to the widow for life, with power of disposition for use and support; and the child gets nothing until the death of the mother, and then only what remains, if anything, after the execution of the power. This conclusion is in harmony with reason and authority, and we have no hesitancy in adopting it. See *Willard's Estate*, 68 Pa. 327; *Waterman v. Hawkins*, 63 Me. 156; *Rhodes v. Weldy*, 46 Ohio St. 234 (20 N. E. Rep. 461, 15 Am. St. Rep. 584); *Potter v. Brown*, 11 R. L. 232; *Bowen v. Hoxie*, 137 Mass. 527; *Holloman v. Copeland*, 10 Ga. 79.

These conclusions relieve us of the necessity of determining the proper construction of the section of the Code before quoted. We may say, however, that the interpretation of this language is by no means free from doubt. It differs very materially from that used in other states, which generally provide that the birth of a child, for which no provision has been made or which is not mentioned in a will, shall operate as a revocation. Moreover, the question as to the effect of the birth of an illegitimate child, whose paternity has been recognized after the execution of a will and before the death of the testator, or the adoption of a child between these two periods, is left in considerable doubt. In view of the conclusions reached, we are relieved of the necessity of considering these matters. What the rule should be in the event substantial provision was made for the after-born child, we do not decide. There might be a case where it would be of manifest advantage to the child to have such a will upheld and supported. In such cases, we are not prepared to say that the will should be treated as revoked by the birth of the child.

The ruling of the district court on the demurrer is correct, and the judgment is **AFFIRMED**.

HATTIE HOPKINS, Appellee, v. **A. M. ANTROBUS**, as Executor of The Will of William Miller, Deceased, Appellant.

Adoption: WHAT ARTICLES OF MUST CONTAIN. Under sections 2600 and 2601 of the Revision of 1860, articles of adoption which fail to show "consent of the parent to such adoption" or that the child was "given to the person adopting as his own child" are not in compliance with the statutes, though liberally construed, and therefore invalid.

Appeal from Des Moines District Court.—**HON. W. S. WITHROW**, Judge.

THURSDAY, APRIL 9, 1903.

120 21
135 470
135 477
135 481

120 21
140 93

THE opinion states the case.—*Reversed.*

A. M. Antrobus for appellant.

Stutsman & Stutsman and *Blake & Blake* for appellee.

WEAVER, J.—William Miller, a resident of the city of Burlington, Iowa, died testate September 4, 1899. By the terms of his will he devised a certain lot or tract of land (which constituted his entire estate) to A. M. Antrobus, in trust to sell, and to devote the moneys thus obtained to charitable purposes. The plaintiff brings this action, alleging that she is the daughter by adoption of the testator, and his only heir at law, and as such entitled to inherit the estate. To avoid the effect of the will, she relies upon the statute (Code, section 3270), which says that no devise or bequest to a corporation not organized for pecuniary profit shall be valid in excess of one-fourth of the testator's estate. Issue was taken upon this claim by the trustee, and upon trial to the court there was a decree for the plaintiff, adjudging her to be the owner of an undivided threefourths of the property. The trustee appeals.

While other questions are presented by the pleadings, the arguments of counsel before us are directed solely to the matter of plaintiff's adoption by the testator. The appellant contends: First, that there is no proof that any deed of adoption was ever made; and, second, that, if the instrument relied upon by the plaintiff was in fact executed by the parties whose names are thereto attached, it is wholly insufficient to evidence a valid adoption. As the latter objection, if well taken, is decisive of the case, we turn to the instrument itself. The original document was not found or produced upon the trial, but the record thereof in the office of the recorder of Des Moines court is in the following words:

"This instrument in writing made and entered into this 31st day of July, A. D. 1862, by and between William Miller, of the City of Burlington, in the County of Des

Moines and State of Iowa, of the First Part, and H. C. Ohrt, County Judge of said Des Moines County, and Virginia Rosser, party of the Second Part, of said Des Moines County, witnesseth, That the said William Miller hereby adopts in accordance with the provisions of Chapter 107 of the Code of Iowa (Revision 1860,) 'Hattie Rosser, minor child of said Virginia Rosser, now about five years old, giving to and conferring on said minor the name of 'Hattie Miller,' and conferring on said Hattie all rights and privileges in law in said Chapter 107 contained, and the said H. C. Ohrt, County Judge hereby consents to this act of adoption. In witness whereof we the said parties, to wit: William Miller, Virginia Rosser, mother of said Hattie, and H. C. Ohrt, County Judge, have hereunto set our hands this 31st day of July, A. D., 1862.

"Wm. Miller,

"Virginia Rosser,

"H. C. Ohrt, Co. Judge."

The instrument was acknowledged by William Miller and Virginia Rosser, and was on the same day duly recorded in the office of the recorder of the county. The statute in force at that date respecting the adoption of children is found in chapter 107 of the Revision of 1860, and, among other things, provides as follows: "Sec. 2600. Any person competent to make a will is authorized in the manner herein set forth to adopt as his own the minor child of another.

"Sec. 2601. In order thereto, the consent of the parent lawfully having the care and providing for the wants of the child, if the parents are divorced or separated, shall be given to such adoption by the statement in writing signed by the party consenting, * * * and stating also that such child is given to the person adopting for the purpose of adopting as his own child."

The point made by appellant is that the deed of adoption relied upon by plaintiff does not substantially conform to this statutory requirement, in that it wholly

fails to show any "consent of the parent to such adoption," and likewise fails to embody any statement that the child was given "to the person adopting as his own child." The right of adoption by which the child of one person may be endowed with all the rights pertaining to the lawfully begotten issue of another person is a creature of the statute, and, like other rights having such origin, its benefits are to be obtained only by a substantial observance of the statutory conditions. It may be conceded, we think, that under the liberal provision of our Code (section 3446) the rule which requires a strict construction of statutes in derogation of common law has no application here, and that a failure to literally follow the language of the statute is not necessarily fatal to the validity of a deed of adoption. But where the act which authorizes an adoption provides that it shall be by a written instrument, executed by certain parties, and placed on record, there must be some substantial compliance with each of these essential requirements. *Long v. Hewitt*, 44 Iowa, 363; *Shearer v. Weaver*, 56 Iowa, 585; *Tyler v. Reynolds*, 53 Iowa, 146; *Gill v. Sullivan*, 55 Iowa, 341.

Most of the cases which have come before us under this statute have turned upon the question of the necessity of recording the deed, and in each instance we have held that without such recording during the minority of the child and lifetime of the person adopting it the deed is unavailing. Now, the provision requiring the recording of the instrument is no more imperative than the one which declares that the parent lawfully having possession of the child shall consent "by a statement in writing" to the adoption, and shall (in writing) "state also that the child is given to the person adopting for the purpose of adoption as his own child." As the natural guardian of the child, entitled to its care, the consent of the parent to a surrender of such right is properly made a prominent and explicit requisite to the validity of an adoption, and the requirement that

it be expressly embodied in the writing is eminently wise. Reading the instrument before us, it appears to be wholly without any word or words which we can construe as meeting this demand of the statute. The declaration of the writing is that "William Miller hereby adopts Hattie Rosser, minor child of Virginia Rosser," and "H. C. Ohrt, county judge, hereby consents to this act of adoption." Now, as the mother, then a divorced woman, is shown by the record to have been "the parent lawfully having the care of the child," the consent of no other person or officer was necessary to the adoption; and the joining of the county judge in the deed and his consent to the adoption were of no legal effect. The deed must therefore, be construed the same as if the name and consent of the county judge were stricken therefrom. We have left, then, simply a writing in which Mr. Miller undertakes to adopt the plaintiff, and confer on her the privileges of a child born to him, but in which instrument the mother takes no part whatever save to sign and acknowledge it. Nowhere in the writing does she express her consent to the act, and nowhere does she say that she gives the child to Miller for the purpose of adoption. It is possible that these two declarations of consent and gift might be treated as tautological, and that, if either was clearly expressed, the absence of the other would not necessarily be a vital defect; but to say that a deed of adoption barren of both may be upheld is to nullify the statute. If this were an ordinary contract, or the rights now claimed by the appellee were such as might exist at common law or independent of the statute, it might be well said that the mother's consent would be implied from the mere fact that she signed and acknowledged the instrument, but we cannot, by implication, supply a stipulation which the statute says must be stated in express written words.

The judgment of the district court will therefore be reversed, and the plaintiff's petition dismissed.—REVERSED.

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STATE OF IOWA V. S. C. KIRBY, Appellant.

Quarantine: ENFORCEMENT OF RULES OF HEALTH. The power conferred by statute upon state and local boards of health to adopt rules and regulations for the preservation of the health of the local community must be exercised by the authorities as provided in the statute.

Infectious Disease: NOTICE BY PHYSICIAN. Where no written notice is given by the physician of the existence of an infectious disease, as required by Code, section 2568, the local board of health is without authority to enforce a quarantine.

Waiver of Notice. A person by consenting to a quarantine may waive the notice of an infectious disease required by statute, but where the notice of quarantine is not given there can be no prosecution for disobeying the order establishing the quarantine.

Appeal from Greene District Court.—HON. Z. A. CHURCH,
Judge.

THURSDAY, APRIL 9, 1903.

THE defendant was tried and convicted of disobeying a quarantine alleged to have been established by the local board of health. From a judgment on the verdict, he appeals.—*Reversed.*

W. W. Turner and Shortley & Harpel for appellant.

Chas. W. Mullan, Attorney General and *Chas. A. Van Vleck* Assistant Attorney General, for the State.

SHERWIN, J.—The local board of health of the incorporated town of Grand Junction undertook to quarantine the defendant for smallpox on the 1st day of June, 1901; and the indictment charges that he disobeyed the order of the board, and left the premises where he had been confined before the quarantine was raised, and without the consent

of the proper authorities. The sufficiency of the indictment is questioned, but this we need not determine, because of the view we take of the controlling question in the case, namely, the legality of the quarantine.

It is unquestionably true that the preservation of the public health is of paramount importance to the state at large, as well as to local communities, and that the state, in the exercise of its police powers, may confer upon the state and local boards of health whatever powers are deemed necessary for the preservation of the general health of a community or of the state. It may, perhaps, be conceded that, even in the absence of express statutory authority so to do, the authorities of a local community would have inherent or implied power to adopt such rules and regulations as were reasonably necessary for the preservation of the public health of such community; but, whenever the state has expressly conferred such power, it must be exercised as provided in the grant. The policy of the law of this, as well as most of the other states, has been to confer great power upon those boards; and it may be conceded that, so far as the exercise of those powers is concerned, a liberal construction should be given to the rules and regulations adopted by such board. *Wong Wai v. Williamson* (C. C.) 108 Fed. Rep. 1. "But they must not unreasonably interfere with the liberty, property, and business of the citizen." *Commonwealth v. Patch*, 97 Mass. 221. "And whether such regulations are reasonable, impartial, and consistent with the state policy is a question for the court." *State v. Speyer*, 67 Vt. 502 (32 Atl. Rep. 476, 29 L. R. A. 573, 48 Am. St. Rep. 832). While the law seeks the welfare of the greater number, and says that individual liberty and property must yield for the time being thereto, it has prescribed the preliminary steps necessary to deprive the citizen of these constitutional rights, and

1. QUARANTINE: enforcement of rule of health.

it is but just and in accord with settled legal principles that the courts require a strict adherence to the statute in matters of this kind.

Chapter 59 of the Acts of the Twenty-fourth General Assembly provided that, "upon written notice given by any physician that smallpox * * * exists in any place,

2. NOTICE by physician. it shall be the duty of the mayor * * * to establish quarantine." Section 2568 of the Code says that "the quarantine authorized * * * in case of infectious or contagious diseases may be declared or terminated by the mayor * * * upon written notice given by any practicing physician of the existence of such disease." The local rules under which the board acted in this case were adopted in 1894, and we think they do require a written notice as provided by the statute; but, whether this is so or not, the statute required it when the rules were adopted, and, what is of more importance, it was required when the attempt was made to quarantine the defendant. No such written notice, however, had been given by any physician; and we think the board was, for this reason, without authority to restrain the defendant. It is not necessary for the preservation of the public health that the mayor be allowed to shut a person up in his own house, or in a pesthouse, on the mere suggestion of any one who may be unduly alarmed over appearances. Every town now has a competent physician for its health officer, and, in case of his temporary absence or inability to act, other competent physicians may easily be obtained for an examination and the written report required by the statute.

It is said, however, that the defendant consented to this quarantine. That he might have waived a formal notice thereof may be conceded, but surely it will not be 3. WAIVER of notice. contended that he could be convicted of a violation of the quarantine statute simply because he had agreed to remain secluded from his fellows

for a given length of time. Had he done this, he might be guilty of a breach of contract, but nothing more.

Other matters are discussed in argument, but, as what we have already said will dispose of the case, we do not give them further consideration.

The judgment is REVERSED.

JOHN L. DARR, Appellee, v. HARRIET LOUISE DARROW *et al.*,
Appellants.

Specific Performance: EVIDENCE: CREDIBILITY OF WITNESS. Where

- 1 the plaintiff attaches interrogatories to his petition which defendant answers, and the same are read in evidence by him, he thereby vouches for the credibility of such witness.

Agency: BURDEN OF PROOF. Where the plaintiff relies on a letter

- 2 claimed to have been written by defendant as his authority to make a contract for the sale of her land, and the only evidence of its genuineness is the testimony of witnesses that they are accustomed to comparing signatures and that the handwriting on the envelope containing the letter is the same as the signature of defendant affixed to other instruments, and where defendant denies having written the letter or having knowledge thereof, there is a failure to sustain the burden of proof cast upon the plaintiff to establish his agency.

Proof of Letter. The fact that defendant addressed an envelope is

- 3 not sufficient proof that she wrote or had a knowledge of the contents of the letter contained therein. Especially is this true where defendant denies having written the letter.

Appeal from Linn District Court.—HON. W. G. THOMPSON,
Judge.

THURSDAY, APRIL 9, 1903.

ACTION in equity to compel specific performance of an alleged contract to convey certain lands. The opinion states the facts. There was a decree in favor of plaintiff, and defendants appeal.—*Reversed.*

Chas. A. Clark & Son and W. G. Clark for appellants.

Giffen & Voris for appellee.

BISHOP, C. J.—The plaintiff resides in Linn county, this state, and the defendants reside in Owego, in the state of New York. The lands in controversy are situated in Bertram township, Linn county, and consist of one hundred and twenty acres. It appears without dispute that such lands were owned by Harvey M. Hill, of Escambia, Alabama, in his lifetime; that by his will he bequeathed the same to his minor son, Orin H. Hill, on condition that said Orin, live until attaining his majority, otherwise the title and ownership of said lands to go to Mrs. Sabrina Platt, sister of said Harvey M. Hill. Subsequent to the death of his father, which occurred shortly after the execution of the will referred to, Orin H. Hill, died, and this before attaining his majority. Sabrina Platt died intestate leaving surviving her the defendant George Platt, her husband, and the defendant Harriet Louise Darrow, her daughter and only child.

The plaintiff grounds his action upon an alleged contract for the purchase of said lands entered into between himself and one Upton of the one part, and the defendant Darrow, acting through J. J. Daniels, of Bertram, Linn county, as her authorized agent, of the other part. It is evident that, in the first instance, a determination of the case must be made to depend upon the question of the agency and authority of the said Daniels. It appears that for some years Daniels had acted for the respective owners of the land to the extent of contracting with tenants, collecting rents, and paying taxes. His authority seems to have been limited to such matters. It is alleged in the petition of plaintiff that on March 10, 1898, defendant Darrow wrote a letter to said Daniels, and which was duly received by him, as follows:

"Owego, March 10, 1898.

"Mr. Daniels: I wrote a letter about ten days ago telling you that Orin Hill could not live but a few days. I directed the letter to Bertram so I don't know whether you received it or not. I write again today to let you know that Orin Hill died the 3d day of March and as he was not twenty-one years of age when he died, the land goes to me. It was willed to my mother, Mrs. George Platt, if he died before he was of age, and as my mother is dead the land is mine. Will you please write and let me know whether the taxes have been paid or not and if there is any tax against the land, let me know how much it is. The land is for sale now. I would like to have you let me know what you think the land is worth. I am ready to sell it if I can get what it is worth.

"Yours truly,

Mrs. Louise Darrow.

"You will get a letter in a few days from my attorney, a Mr. Andrews. He attends to my business here. I will let you have the selling of the land and want you to get all you can for it.

Mrs. Louise Darrow."

It is further alleged that immediately following the writing and receipt of such letter an extended correspondence was had between the attorney named in the letter, Geo. F. Andrews, Esq., and said Daniels, and that by said letter written by defendant, and such subsequent correspondence with the attorney named, the said Daniels became fully authorized and empowered to contract for the sale of said land, and that pursuant thereto he did contract on behalf of said defendant Darrow to sell and convey the same to plaintiff and said Upton. The relation between plaintiff and said Upton need not be noticed in this connection.

The defendant Darrow, in her answer, denies *in toto* the writing of the letter of date March 10, 1898, and denies that the attorney mentioned in said letter had

any authority to bind her by any contract for the sale of the lands in question, or to authorize said Daniels to act as her agent, and with authority to bind her by any such contract. Manifestly, if these allegations of the answer shall be found to be true in point of fact, the plaintiff's action must go to the ground at once, and we shall have no occasion to consider any other question made in the case. Accordingly, we turn to the record to ascertain what is the evidence upon which the determination of such issue of prime and vital importance must be made to rest.

Attached to his petition, the plaintiff filed and propounded certain interrogatories, to which, under the rule of the statute, defendant was required to make answer at

the time of her appearance and pleading.
I. EVIDENCE: credibility of witness. This was done, and upon the trial such interrogatories and answers were offered and read in evidence by the plaintiff. In such answers Mrs. Darrow denies unequivocally that she wrote the letter of March 10th, denies that she authorized any one to write such a letter for her, and denies that she ever saw or knew of such letter until after the commencement of this action. She further says that Geo. F. Andrews was her attorney in some specific matters of litigation, but that he had no authority to act for her in the matter here in question, save that upon receiving a letter from Daniels in April, 1898, saying that he had made a sale for her of the Linn county lands, she directed said Andrews to write Daniels to the effect that she did not recognize him as her agent for the sale of such lands, but authorizing him to make inquiries, and see if a sale could be made for an amount and on terms satisfactory to her. She says that the letter in question is in the handwriting of her father and codefendant, George Platt.

Plaintiff called as a witness J. J. Daniels, who testified that he had at one time been county recorder of Linn county, and that he was accustomed to examining and comparing signatures and handwriting; that he had

compared the handwriting, being the name and postoffice address written upon the envelope in which the letter of March 10th was received, with the signature of defendant Darrow attached to the verification of her answer filed in this case, and that it was his impression that the handwriting in each instance was the same. There was also called to the attention of the witness three other and different instruments, relating to conveyances of lands in the state of New York, and purporting to be signed by Harriet Louise Darrow, and acknowledged by her before a notary public of that state, and in respect of the several signatures attached to such instruments the witness testified that, in his opinion, each was written by the same hand that wrote the signature found in the verification of the answer in this case. Several bank officers and an expostmaster and county official were called as witnesses by plaintiff, each of whom testified in reference to handwriting substantially in accord with the testimony of Daniels. To the testimony of each of such witnesses the defendant made objection that the same was incompetent and immaterial, and because no proof had been made that the signatures upon the respective instruments produced were in the handwriting of defendant Darrow.

The foregoing constituted all of the testimony offered and introduced by plaintiff bearing upon the matter now under consideration. Taken as a whole, it falls far short of being sufficient to establish as a matter of fact the allegation as to the agency found in the petition. In this conclusion we are all agreed. The burden is upon plaintiff to establish by satisfactory evidence the fact of agency, and that the making of a contract of sale was within the scope of the powers granted. The only direct evidence upon the subject is that furnished by the testimony of Mrs. Darrow, a witness for plaintiff. Of all the witnesses, she alone speaks as of her personal

2. AGENCY:
burden of
proof.

knowledge. By making her a witness on his behalf—and such is the effect of his reading the interrogatories and her answers thereto in evidence—the plaintiff vouches for her credibility as a witness. *Hunt v. Hoover*, 34 Iowa, 77; *Clapp v. Peck*, 55 Iowa, 270.

Now, she declares in positive terms that she had no knowledge whatever of the alleged letter of authority until long after this suit was brought, and in this she is wholly uncontradicted, according to our view of the situation. A brief analysis of the remaining evidence offered and introduced on behalf of plaintiff will demonstrate this. At the outset it is to be observed that Mrs. Darrow was not personally present at the time of the trial. Plaintiff went to trial relying wholly upon the answers given by defendant to the interrogatories attached to his petition, and the testimony of opinion witnesses concerning the handwriting upon the envelope in which the letter in question was received by Daniels. As we have seen, Mrs. Darrow denies that the letter is in her handwriting, and denies all knowledge of the fact that the letter was written and mailed. In the interrogatories her attention does not appear to have been called in any manner to the envelope in question. No one of the witnesses pretends to be familiar with her handwriting, or to have any knowledge thereof. Accordingly, there is no direct evidence concerning the authorship of the handwriting on the envelope. It follows that plaintiff must pin his hope of recovery solely upon faith, first, that the opinion evidence introduced by him makes it sufficiently clear, and therefore establishes the fact, that the handwriting on the envelope is that of Mrs. Darrow; second, that therefrom it can be conclusively presumed as a fact in the case that Mrs. Darrow either inspired the writing of the enclosed letter, or was familiar with its contents, and this notwithstanding the specific denial on her part. See *Borland v. Walrath*, 33 Iowa, 130.

For the purposes of this case, we might admit that the evidence sufficiently establishes the handwriting on the envelope to be that of Mrs. Darrow. Possibly grounds can be found upon which to justify such a conclusion. But to draw from such conclusion alone the further conclusion contended for—that is, that therefrom she must have been acquainted with the contents of the enclosed letter—can not be justified, either in reason or in logic. The simple fact that one has addressed an envelope by his own hand may give rise to an inference that he is acquainted with the written contents of such envelope, but such inference by no process of simple reasoning can be dignified into a conclusion having the probative force of an established evidentiary fact. And especially must this be true for all purposes of practical application when the inference relied upon is opposed by the evidence, altogether credible, of the only person who can testify as to the fact involved from personal knowledge.

The claim made in respect of the letters written by Andrews may be disposed of in a word. We do not think such letters can fairly be made to bear the construction put upon them by appellee. Be this as it may, however, there is no evidence showing authority on the part of Andrews, or that defendant had knowledge of the contents of such letters so that she became bound thereby.

We conclude that no authority on the part of Daniels to make the alleged contract of sale has been shown. The other questions made by the record may, therefore, be passed over in silence.

The decree of the district court is reversed, and the cause remanded, with instructions to dismiss the petition of plaintiff, and to enter judgment against him for costs.

—REVERSED.

THE STATE OF IOWA v. JOHN WILLIAMS, Appellant.

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128 454

Breaking and Entering: ALLEGATION OF OWNERSHIP. In an indictment for breaking and entering, it is sufficient to aver possession in someone, without alleging the name of the owner.

Instruction: INTENT. An instruction in relation to breaking and entering, under Code, section 4791, which makes no reference to the intent, is erroneous.

Instruction: EVIDENCE. Evidence in the case considered and held insufficient to warrant an instruction based on the theory that defendant was found in possession of the stolen property shortly after the breaking and entering.

Breaking and Entering: POSSESSION OF STOLEN PROPERTY: INSTRUCTION. It is only when the breaking and entering and the larceny are committed at the same time and by the same person that the recent possession of the stolen property will justify a conclusion that the person who stole the property also did the breaking and entering.

Appeal from Polk District Court.—HON. W. H. McHENRY,
Judge.

THURSDAY, APRIL 9, 1903.

DEFENDANT was indicted, tried, and convicted of the crime of breaking and entering, and from the judgment imposed he appeals—*Reversed.*

No appearance for appellee.

J. B. Rush and Woodson & Brown for appellant.

DEEMER, J.—Defendant was accused of breaking and entering a building in the possession of F. Brody & Son, in which building goods and merchandise were kept for use, sale, and deposit. On trial he was convicted of the offense, and, to secure a reversal relies on several alleged errors, which we shall now proceed to consider.

I. The indictment is said to be defective because it does not allege the name of the owner of the building. As the crime is against the possession of the building, it is sufficient in this state to aver possession of the building in

1. ALLEGATION of owner-ship. some one, who, for the purpose of such an action, is deemed to be the owner. *State v. Rivers*, 68 Iowa, 611. The allegation of ownership is simply for the purpose of identification, and not to give legal character to the occupancy. Similar indictments have been sustained in other states under like statutes. *Pyland v. State*, 33 Tex. Cr. App. 382 (26 S. W. Rep. 621); *Com. v. Williams*, 56 Mass. (2 Cush.) 582; *State v. Scripture*, 42 N. H. 485. See, also, *State v. Jelinek*, 95 Iowa, 420.

II. In its instructions to the jury the court, among other things, said that, "if any person break and enter any shop, warehouse, * * * in which goods * * * are kept for use, sale, or deposit, he shall be punished,"

2. INSTRUCTION: intent. etc. This instruction was erroneous in that it omitted entirely the motive of the offender. The statute makes one guilty only when he breaks and enters with intent to commit a public offense. See Code, section 4791. This defect was not cured in other portions of the charge, and is sufficient ground for reversing the case.

III. The trial court instructed at length regarding the effect of evidence of the possession of property recently stolen from the building alleged to have been broken and entered. The record does not disclose such a state of facts as would justify the giving of this instruction. The stolen goods were not found in the possession of the defendant, and there is no showing that he had any connection therewith. The property stolen consisted of gentlemen's trousers and a number of handkerchiefs. All that is shown is that a policeman saw some persons come out of a lumberyard and cross the street, going in the direction of a building on the street opposite the yard. This policeman, with another, went to the lumber

yard, where they found a basket. Near the basket were some tracks leading in the direction of an old store building. Following these tracks, they went to this building, and there found some property which had been stolen from the building described in the indictment. Defendant did not own nor have any right in this building where the goods were found, and, so far as shown, he never had possession of any of the goods. The officer also found some tracks leading to defendant's house, and, suspicioning the defendant, he followed the tracks, and early in the morning of the next day after the crime was committed he arrested the defendant. Defendant said that he had that evening been near where the footprints were discovered. This was all the evidence regarding possession of the goods. Surely it was not sufficient to justify an instruction based upon the theory that defendant had been found in the possession of goods stolen by breaking and entering a building shortly after the crime was committed.

Moreover, the instruction with reference to the effect of the possession of the goods was erroneous. It reads as follows: "Possession of stolen property shortly after theft

is sufficient to raise the presumption of guilt, unless the attending circumstances or other evidence so far overcome the presumption

which is raised as to create a reasonable doubt of the prisoner's guilt. So, too, the possession of property that has been recently stolen from a building by means of breaking and entering said building creates a presumption of guilt of the person or persons in whose possession said property is found. That is, it creates a presumption that he or they are the party or parties that broke or entered said building and took therefrom the said property, unless the attending circumstances or other evidence adduced explained such possession and shows that the same might have been otherwise acquired. If, therefore, in this case, you find that the building in controversy was in

1. BREAKING
and enter-
ing: posses-
sion of stolen
property:
instruction.

fact broken into and entered substantially as alleged in the indictment, and that there was therein at the time goods and property that have been introduced in evidence as property stolen from said building, together with other property which was kept for use, sale, or deposit, and that said property or some of it was at the time alleged stolen and carried away from the building, and shortly thereafter the said property, or some of it, was found in actual possession of the defendant, then said possession would raise a presumption of guilt of the defendant, unless the attending circumstances or other evidence adduced so far overcomes the presumption thereby created as to raise a reasonable doubt of the guilt of the defendant."

It is only when the breaking and entering and the larceny are committed at the same time and by the same person, in other words, where the goods are stolen by means of the breaking and entering, that any effect is to be given the recent possession of such goods. In such a case the jury may be instructed that such possession, if unexplained, will justify them in concluding that the person who stole the goods also did the breaking and entering. But they are not bound to make such an inference. At most, there is a mere presumption of guilt from the possession of the goods, which, in the absence of explanation, will justify the jury in concluding that the one in possession of property recently stolen, by means of breaking and entering, broke and entered the building. *State v. Jennings*, 79 Iowa, 513. For the reasons stated, the instruction was erroneous. *Rex. v. Hughes*, 14 Cox Cr. Cas. 223.

Some other assignments are argued, but, as the matters relied upon are not likely to arise on a retrial, we do not consider them. For the errors pointed out, the judgment is REVERSED.

H. H. EVERTS, Appellant, v. J. T. EVERTS *et al.*, AND
CHARLES H. EVERTS, Appellant, v. J. T. EVERTS *et al.*

Deeds: ESCROW; RIGHT TO RECALL. Where a father executes deeds conveying his real estate to his sons and places the same in escrow, with instructions to deliver them upon his death, but retaining the title and control of the deeds and the right to withdraw them, the transaction is of a testamentary character and the father has the right to cancel the deeds at pleasure.

Appeal from Tama District Court.—HON. G. W. BURNHAM,
Judge.

FRIDAY, APRIL 10, 1903.

CONTROVERSY over certain lands. The causes were submitted together. The facts sufficiently appear in the opinion. The petitions were dismissed, and plaintiffs appeal.—*Affirmed.*

Caldwell & Walters for appellants.

Struble & Stiger and *Endicott & Pratt* for appellees.

LADD, J.—Two tracts of land are involved in this controversy—eighty acres claimed by Charles H. Everts, and one hundred and ten acres by H. H. Everts, only children of the defendant J. T. Everts, who was seventy-five years old at the time of the trial. Their mother had died early in 1900, and apparently this trouble was precipitated by the father's contemplated second marriage, subsequently consummated. Shortly after his first wife's death, an attorney was employed to prepare deeds to his sons of the tracts as above stated; also a lease of eighty acres to Charles for twenty years at the annual rental of \$180, and another to H. H. for the same period at the annual rental of \$238; lessee to pay taxes, and said leases to terminate

at lessor's death. The father signed and acknowledged all these instruments and the sons the leases. The deeds never passed to the possession of the grantees, but were handed to Ralph Moore with instructions to deliver to them upon the father's death. It is contended, however, that what in fact occurred amounted to a delivery because of a valuable consideration paid and an understanding that they were not to be subject to recall. It may be, if these conveyances had been executed, as claimed by appellants, in consideration of the leasing of the land and the payment of \$1 each and the expenses incident thereto, and had been placed with Moore in pursuance of such arrangement without instructions, save to deliver at the death of the grantor, or under an agreement, as contended by appellants, that they should not be withdrawn save by mutual consent, the grantor might not have lawfully withdrawn or destroyed them. But the burden of proof was upon the plaintiffs to establish this state of facts.

Opposed to their version of the transaction is the positive testimony of the scrivener and the defendant Everts to the effect that there was an explicit understanding that the latter should retain title and control of the deeds until his death, and that said deeds were left with Moore, as he also declared, subject to the father's right to withdraw them. The rental stipulated was less than the reasonable value of the use, and the long period of the lease is not inconsistent with this view, as Charles had already farmed the eighty, twenty years, and H. H. a part of the one hundred and ten acres fifteen years, and his son the remainder for six years. The change from share to cash rent is explained by the breaking up of the father's home, his wish to be relieved from care, and his intention to travel. All the circumstances are in harmony with the defendant's contention, and we are inclined to think it correct, especially as this conclusion is in accord with the finding of the district court, having the advantage of

observing the witnesses and hearing the testimony given orally. The entire arrangement seems to have been of a testamentary character, adopted in order to equitably distribute the parent's estate in event of his sudden death without the aid of the courts; and, but for the intrusion in his life of a sentiment not anticipated at the time, would, in all probability, have been carried out. But, according to Weaver, J., in *Perkins v. Perkins*, 116 Iowa, 258, "the mating instinct does not necessarily wane with advancing years," and, even though these deeds were obtained from Moore, and destroyed, as a condition precedent to his marriage, imposed by the woman of his choice, he did no more than he had the right to do in the control of his own property. *Shirly v. Ayres*, 14 Ohio, 317 (45 Am. Dec. 546); *Fitch v. Bunch*, 30 Cal. 213; *Berry v. Anderson*, 22 Ind. 36; *Cook v. Brown*, 34 N. H. 460; *Prutsmann v. Baker*, 30 Wis. 644 (11 Am. Rep. 592); *Tyler v. Hall*, 106 Mo. 313 (17 S. W. Rep. 319, 27 Am. St. Rep. 337).

The claim of appellants that their father had given them the respective tracts many years previous is in conflict with every fact proven in the case. It seems that Charles sold his father thirty of the one hundred and ten acres, and both sons testify that the former was to have eighty acres and to improve it as he saw fit. But the only improvement was its proper cultivation and the construction of a new fence in the place of an old one. The thirty acres are said to have been given to H. H. Everts, and to have been included with his own farm in fencing. The payment for the use of this land for fifteen or twenty years in cash or with a share of the crop, regardless of whether denominated support or rent, and the acceptance of the twenty year leases, are facts so inconsistent with the claim of gift as to scarcely need the father's denial and proof of his payment of the taxes in confirmation of the conclusion that transfer of title or ownership was neither intended nor effected. We do not

pretend to review the evidence in detail, but content ourselves with stating barely enough to indicate the conclusions reached. The law applicable is so elementary as to demand no elucidation.

Our conclusion is that both causes were rightly decided, and must be **AFFIRMED**.

G. M. Cox, Plaintiff, v. GEORGE W. BURNHAM, District Judge, Defendant.

Intoxicating Liquors: CONSTRUCTION OF STATUTES. Statutes relating to the sale of liquor are construed by the same rules applicable to the construction of statutes generally, except as modified by Code, section 2431, which provides that the general chapter relating to intoxicating liquors shall be so construed as to prevent evasion.

Same: APPLICATION FOR PERMIT: POWER OF COURT TO FIX HEARING.
2 Code, section 2389, providing that applications for permits to sell liquor are to be taken up and disposed of on convening of court, where no cause to the contrary appears, is not mandatory, nor does the provision that "the court shall fix a day in the term for the trial, and all applications shall be tried at the first term * * * if the business of the court shall allow," in case a remonstrance is filed or other cause appears, abridge the general power of the court to determine the business for the term.

Dismissal of Application: HEARING ON. If in the exercise of the
3 court's discretion the time for hearing an application for a permit to sell liquor is not fixed for the term at which it is filed, nor before the judge in vacation, an adjournment of the term will not *ipso facto* operate as a dismissal of the application or deprive the court of jurisdiction.

Continuance: CAUSE PRESUMED. It will be presumed, in the absence of a showing to the contrary, that there was cause for
4 continuing the hearing over the term on an application for permit to sell liquor.

FRIDAY, APRIL 10, 1908.

CERTIORARI proceedings, originally brought in this court by petition filed October 15, 1902. The plaintiff is a resident and citizen of Benton county, and the defendant is one of the judges of the Seventeenth Judicial District, which includes Benton county. A writ was issued in accordance with the prayer of the petition, to which writ a return has been made as required by law. The cause was submitted at the present term upon the facts as shown by the return thus made, together with the arguments of the respective counsel. By the return it is made to appear that on March 2, 1901, one P. H. Bell, a pharmacist, residing and doing business as such at Van Horne, in Benton county, filed in the office of the clerk of the district court of said county an application for a permit to deal in intoxicating liquors. A copy of such petition is set forth. It is in proper form, and therein is alleged all the facts, which, under the statute, must be made to appear in such cases. On the same day there was filed a notice to the county attorney of said county of such application, having indorsed thereon an acceptance of legal and timely service. Said notice recites that the application in question will come on for hearing in said court at the April term thereof, beginning April 15, 1901. On April 9, 1901, said applicant filed proof showing that proper publication of notice had been made as required by law. On April 22, 1901, the plaintiff, with eight other persons, claiming to be citizens of the county, appeared, and filed a remonstrance, the substance thereof being that there was already one permit in force in said town, and, the population of the town being but four hundred and eighty-four, the welfare of the community did not demand an additional permit. The April term of said court was presided over by Hon. Obed Caswell, one of the judges of said district. For some unexplained reason said application was not called up during the term, and was continued generally to the

next term, which convened in September, 1901. On October 14, 1901, being a regular day of said term, there appeared before the court, this defendant presiding, the attorney for said applicant and the county attorney in his official capacity, and also for and on behalf of said remonstrants, and by agreement October 24, 1901, was fixed as the time of hearing said application before the court. It further appears that on the day so fixed the applicant appeared with his attorney, and the county attorney appeared representing the public, and assuming to represent said remonstrants; that a hearing was had, the applicant introducing evidence to sustain the allegations of his application. Among other things, the attention of the court was called to the fact that there had been filed in said matter a paper signed by all but two of the remonstrants, the plaintiff herein being one of such two, asking leave to withdraw their names from the remonstrance, and that the court consider the same no further. As a result of the hearing, the court ordered that a permit issue in the manner and under the conditions provided by law. Proceedings *dismissed*.

Chas. A. Clark & Son and Wm. G. Clark for plaintiff.

Cato Sells and Clarence Nichols for defendant.

BISHOP, C. J.—It is the contention of plaintiff that defendant was without jurisdiction to act in the premises, and this contention is made to rest solely upon the fact that the application was heard and order made at a term subsequent to that to which the proceeding was brought. This brings us directly to a consideration of the statutes bearing upon the subject of granting liquor permits to pharmacists. Section 2387 of the Code, among other things, requires the application to be by petition, to be filed in the clerk's office at least ten days before the term at which the matter is to be for trial. In section 2388 it

is provided that notice shall be given of such application by publication in a newspaper three consecutive weeks, the last publication to be not less than ten or more than twenty days before the first day of the term at which the hearing is to be had. Said section also provides that a copy of such notice shall be served upon the county attorney. Section 2389 provides as follows: "Upon the return day of the notice the court * * * shall, if no remonstrance has been or is offered to be filed, unless for cause postponed to some other day in the term, proceed to hear and try the application. Any remonstrance against or objection to the granting of the permit must be in writing, and filed in the clerk's office by noon of the first day of the term, unless further time be given, and shall be so filed before the date fixed for trial. Such remonstrance or objection may be made by any citizen of the county * * * and the court shall fix a day in the term for the trial, and all applications shall be tried at the first term after completed service has been made of the required notice, if the business of the court shall allow. * * * The county attorney shall appear in such cases, and any number of persons, not less than five, filing any remonstrance or objection, may also appear by counsel and resist the application. * * * If for any reason the application cannot be tried in term time, the same may be heard by the judge in vacation, at a time to be fixed by the court and made of record."

It is by construction of these statutory provisions that we are to determine the legality of the action of the defendant here complained of. Statutes designed to regulate the sale of intoxicating liquors are to be construed and interpreted by the rules having application to statutes generally, save as modified by section 2431 of the Code, which provides that it shall be the duty of courts and jurors to construe the general chapter relating to the subject of intoxicating liquors so as to

1. CONSTRUCTION
OF
statutes.

prevent evasion. The matter of prime importance in any case is to ascertain what was the intent of the legislature. For this purpose the act itself is to be relied upon in the first instance. If it be found that the terms are ambiguous, or the meaning obscure, resort may be had to the defects in the law as previously existing, and the evils sought to be remedied. In cases like the one before us consideration may be given also to that general policy of the state which it may be presumed the legislature had in mind when framing the enactment. *Wheelock v. Madison Co.*, 75 Iowa, 147; *Brown v. Lewis*, 76 Iowa, 159; *Glass v. Cedar Rapids*, 68 Iowa, 207. So, too, statutes in *pari materia* are oftentimes important aids to correct interpretation. *State v. Sherman*, 46 Iowa, 415.

It is evident from a reading of the initial sentence of section 2389 that the legislature intended that applications for permits are to be taken up and disposed of at once upon the convening of court, there being no remonstrance filed, and no cause to the contrary appearing. This is equivalent to saying that such applications shall be preferred, as a matter of disposition, over the general business of the term. But that the statute was not intended to be construed as mandatory in character is evident not only from the language directly employed, but from the subsequent provisions, consideration of which follows. Proceeding a step farther, if a remonstrance is filed, or if cause appears, then (using the language of the statute), "the court shall fix a day in the term for the trial, and all applications shall be tried at the first term * * * if the business of the court shall allow." Manifestly, the thought here is that if, for either of the reasons stated, the matter is not heard at the opening of the court, a definite time thereafter shall be fixed, so that persons interested may have notice when to appear, and that the time so fixed shall be within the then present term if the business of the court

2. SAME: application for permit; power of court to fix hearings.

shall allow. Now, by no force of reasoning can it be said that it was intended by such provision to take away or impair the general power vested in the court to control the business of the term. Clearly, all the matters for which provision is made in section 2389—whether cause appears upon the opening of court for passing the application, when the order shall be made fixing a time within the term for trial, the date of the trial, whether the business of the court will allow a trial during the first term—are matters involving the exercise of discretion. It is elementary that, where discretion is confided to an inferior tribunal, the exercise thereof is not subject to review, save for an alleged abuse resulting in substantial injustice. As applied to the statute under consideration, and having the provisions of section 2431 especially in mind, conduct upon the part of such tribunal evasive in itself of the spirit and intent of the general liquor law, or as a proximate result of which such evasion may be either authorized or permitted, would be sufficient to constitute an abuse of discretion. We need pursue this thought no further, however, as this proceeding is not predicated upon an alleged abuse of discretion.

We come now directly to the question involved in this controversy. If, in the exercise of the discretion confided to it, the court shall be of the opinion that the amount

and character of the other pending business will not allow the hearing of the application during the term, and a time is not fixed for a hearing before the judge in vacation, does an adjournment of the term operate *ipso facto* as a dismissal of the application proceedings? Clearly, we think not. The question has relation to the subject of practice, and such only. The element of merit or demerit inhering in the application is in no sense involved. Now, if the legislature had intended as a matter of practice that a failure to try and determine at the first term should operate to dismiss the

3. DISMISSAL
of applica-
tion: hear-
ing on.

entire proceedings, and this without regard to any question of merit, but simply and solely upon the grounds that the business of the court did not allow such hearing to be had, it would have been easy to say so, and it should have said so. The lawmaking power did not thus speak in terms, and, taking the statute as we find it written, we are unable to place thereon the construction contended for by counsel for plaintiff. From our reading it is manifest that the thought of the legislature was that such proceedings should be summary in character, that they should be heard and determined as speedily as the interests of the applicant on the one hand and the interests of the general public on the other would permit, and the other business of the court would allow. Within the sense of the language used, however, it is clearly apparent that it was contemplated that many reasons might exist for adjourning the term before a hearing upon an application could be reached—precedence given to more important matters until the expiration of the time allotted to the term, illness of the judge, making an abrupt adjournment necessary, etc. The enactment is, therefore, to be read and understood as meaning that, if, for any cause appearing, and having in mind the other pending business, the court shall not be able to hear the application at the first term, then an order may be made for a hearing before the judge in vacation, and, if this be not done, the matter shall stand continued to the next term, in common with all other undisposed of causes and proceedings; and this pursuant to the general statute having relation to such subject. "Upon any final adjournment of the court, all business not otherwise disposed of shall stand continued." Code, section 238.

It is a familiar principle that, if an exception to a general rule be intended, the language creating and defining such exception must be found in the legislative act

from which the exception derives its existence. There is no language in the statute before us, as we think, that can be distorted into giving the proceedings in question the character of an exception to the general rule. It may be added that to sanction the contrary view would lead to a holding at once unjust, unnecessary, and having no support in reason. It would be unjust and unfair in the extreme to a good-faith applicant, whose petition, through no fault of his own, had gone unheard to the hour of adjournment, to compel him to go to the trouble and expense of filing a new petition for the next term, giving the required notice anew, and so proceed from term to term until finally the business of the court would allow a hearing. No possible interest of the public could be subserved by such a course of proceeding. No doubt it is the policy of the law—and with good reason—that the matter of obtaining a permit to deal in intoxicating liquor shall be difficult, and shall be accomplished only when all the requirements of the law have been strictly complied with. But even such is not to be accepted as ample warrant for adopting, by construction merely, a course of procedure wholly unnecessary, and in all respects unreasonable. As illustrative of this, suppose that at the opening of court a remonstrance be filed presenting questions of such importance that much time is needed for preparation for trial; so, too, material, and perhaps the only, witnesses relied upon by the remonstrants, may be absent, and for the time being inaccessible. Now, if the contention of plaintiff be correct, and the court is disposed to extend any consideration to the applicant whatever, and arrangements cannot be made to have the application heard in vacation, the remonstrants must be forced to trial during the term in any event, as to adjourn without trial would be to dismiss. To pursue the one course would be to utterly disregard the interests of the remonstrants and the public

generally; to pursue the other would be to disregard every interest of the applicant.

Counsel for plaintiff put much stress upon the language found in sections 2387 and 2388, the material provisions of which we have hereinbefore set out. Therefrom it is argued that a trial or hearing is authorized only at the particular term of court to which the proceeding is brought. We think this contention without force. These provisions have relation only to the time of filing the petition and the time of service of notice and the method of making the same. All causes of action, both at law and in equity, and special proceedings, except where otherwise specially provided, shall be tried at the first term after legal and timely service has been made. Code, section 3655. This general provision is as broad and comprehensive as the language found in the sections under consideration. Notwithstanding the language of section 3655, mandatory in character, the continuance of causes is provided for by statute, and continuances are favored when the business of the court requires, or substantial justice will be promoted thereby. We conclude that a continuance of the application in question did not work a loss of jurisdiction, and that a hearing thereon might properly be had at the next term of court.

The defendant returns that the April, 1902, term of court was held by Judge Caswell, and no action, as far as appears, was had upon the Bell application at such term.

4. CONTINU-
ANCE: cause
presumed. Of the reasons therefor we are not advised. We must presume, however, that there was cause for postponement. In the absence of a showing to the contrary, it will always be presumed that a court has acted properly. *McCue v. Wapello County*, 56 Iowa, 698.

At the next term—being the September, 1902, term, the defendant presided. The time for hearing the application was fixed after consultation with the attorney for applicant and the county attorney, representing the public,

and assuming to represent the remonstrants. The latter were not otherwise represented. The hearing was had in open court at the time fixed. All the proceedings appear to have been regular, and in no sense were they evasive in character. If the remonstrants desired to have been represented otherwise than by the county attorney, they should have been present and demanded a hearing. Not having done so, they are in no position to complain.—DISMISSED.

L. J. RIPLEY, Appellant, v. W. J. MCGAVIC AND H. GODDARD,
Appellees.

Accounting: RECEIVERS: EVIDENCE. In an action for an ac-
1 counting for lumber sold by a receiver, the evidence showed
that the estimate of the material received by him was inaccurate, but the total amount realized from the sales and accounted for by the receiver nearly equaled the value as shown by the receiver's invoice, so that an objection that the receiver had not accounted for the property coming into his hands could not be sustained.

Receivers: EXERCISE OF POWERS. A receiver is required to use
2 the care, skill and prudence in the sale and management of property entrusted to him that a man of ordinary skill and prudence would exercise with his own property under like circumstances. He is not liable for errors in judgment, an insurer of the property, or guarantor of particular results.

Same: Where a receiver appointed to sell lumber purchases from
3 other dealers to fill his orders, paying cash from the trust fund, and immediately reimburses that fund by a sale of the same, so that no loss is sustained, those interested in the trust cannot complain, though the receiver had no express authority so to do.

Appeal from Lee District Court.—HON. HENRY BANK, JR.,
Judge.

FRIDAY, APRIL 10, 1903.

ACTION in equity for an accounting. It appears that about July, 1896, the defendant Goddard entered into a contract with the plaintiff, Ripley, involving a stock of lumber, lath, and shingles, then situated in the city of Ft. Madison, Lee county; and that under such contract, and at the time thereof, the said property was delivered into the possession of the plaintiff. Thereafter in an action brought by Goddard against Ripley, based upon said contract, a receiver was duly appointed for, and who took possession of said property, and for a time continued to manage and control the same. June 30, 1897, the parties to that litigation entered into a further contract in writing looking to an adjustment of the matters of difference between them, and providing for the dismissal of the suit, and the discharge of the receiver. The contract so entered into, after referring to the pending litigation, and to the fact that the receiver in possession of the property had borrowed money in the sum of \$2,000, and had been at expense in the care and management of the property, and that costs had accrued, then provides as follows: "It is therefore agreed by and between the parties hereto that W. J. McGavic, of Keokuk, Iowa, shall be appointed the agent of both parties hereto, to take, hold, sell and dispose of said stock, as in his own judgment may seem best, and ship such stock in his own name, and collect all accounts therefor, and to disburse the funds received from said sales of lumber, after paying the legitimate running expenses, as follows: Pay all costs and expenses caused by the appointment of the receiver, but H. Goddard shall pay one-half of the \$2,000.00 and accrued interest, borrowed by the receiver on receiver's certificates and all court costs, except costs on appeal, which shall be paid by L. J. Ripley. It is agreed that when H. Goddard shall have received from said McGavic the sum of \$23,000.00 from sales of stock as herein set forth, including the \$1,000 already charged to his account, and paid on receiver's

certificates, the balance of said stock, and all accounts growing out of the sales thereof, shall revert to L. J. Ripley, and shall be turned over to him by said McGavic. Title to all lumber shall remain in H. Goddard until this agreement is fully carried out. Insurance shall be carried on said stock of lumber by McGavic, to protect H. Goddard against loss, as his interest may appear. W. J. McGavic is to receive for his services \$125.00 per month, and to charge \$25.00 of said salary to the account of H. Goddard, the balance—\$100.00—of said salary and all traveling expenses to be charged up to the expense account.”

The execution of such contract was called to the attention of the court, and an order was made and entered directing the receiver to turn over to McGavic the property in his hands, which was done accordingly. Thereafter McGavic continued in charge of the lumber yard, and in the operation of the same. Plaintiff, becoming dissatisfied with the conduct of the business, brought this suit for an accounting. Goddard refusing to join with the plaintiff in the bringing or prosecution thereof, is made a party defendant. From the decree rendered in the court below, the plaintiff appeals.—*Affirmed.*

Daniel F. Miller and James H. Anderson for appellant.

James C. Davis and Casey & Stewart for appellees.

BISHOP, C. J.—At the time this action was commenced the lumber yard was still being operated by defendant McGavic. At the time of the trial in the court below, however, the property had all been disposed of, and the action was tried without objection as for final accounting and settlement, and a decree entered accordingly.

Many grounds of complaint are stated in the petition, but those remaining to be considered are these: (1) That McGavic has not accounted for all the property in fact received by him. (2) That the business was negligently,

unskillfully, and not in good faith managed by McGavic, and this to the injury and damage of plaintiff. (3) That defendant McGavic has, in violation of the said written agreement, and without any authority, used trust funds in his hands in the purchase from other merchants and in dealing in lumber of the same kind and quality as that held by him under the agreement in question. (4) That defendant McGavic, in connection with his conduct of the business in question, took possession of and sold a large quantity of lumber in which the said Goddard had no interest, but which was owned exclusively by plaintiff, and that he (McGavic) holds the proceeds thereof, and refuses to account.

The answer of the defendant McGavic is a general denial, and, in connection therewith, a specific denial of the allegations of the petition upon which are based the three grounds of complaint first above stated. The defendant Goddard, in his answer, adopts and reaffirms the allegations of the answer of McGavic.

The several matters of complaint may be considered in the order in which they are presented.

From the invoice made at the time the receiver turned the property over to McGavic it appears that there were 3,706,774 feet of lumber of all kinds, 967,500 shingles, and 22,350 lath, the whole being valued, as per 1. ACCOUNTING
by receiver:
evidence. wholesale price lists, at \$35,155.54. The amount reported as sold by McGavic was, lumber of all kinds, 3,412,977 feet, 997,500 shingles, and 36,400 lath, from the sale of all which there was realized in cash \$34,191.29. It appears that at the time the lumber was turned over to McGavic it was in piles, and unassorted—that is, the different grades were mixed together indiscriminately—and that some was hemlock, some Norway pine, and the rest white pine. Each grade and each variety had a different value. It seems that Ripley, while in possession, had gone through the yard, and marked on the

piles the grade and character of the lumber, and such marking was, in the main, accepted by the receiver as correct and accurate in making the invoice. That such marking was neither correct nor accurate in point of fact is fully established, as we think, by the evidence. The former receiver, who was a witness, testifies that the contents of some of the piles were estimated only; could not get accurate measurements. And, further: "I used the wholesale price list of S. & J. C. Atlee and Knapp, Stout & Co., by which I report the value of the lumber. But in no wise do I accept the grades as indicated on the piles of lumber to be in the whole equivalent to the grades of Knapp, Stout & Co. or S. & J. C. Atlee, as many thousand feet of hemlock and Norway is mixed through the piles, all of which is not considered to be of equal value to white pine of the same grade, and I feel assured that the true value of this lumber can only be ascertained by resorting and regrading each and every pile."

There is considerable other evidence in the record tending to prove that the invoice as made by the receiver was not correct. It will be sufficient for our purpose to refer to the testimony of one of the witnesses. He says: "In Campbell's [the receiver's] inventory, pile number 164 is inventoried at 31,872 feet, number 197 at 40,320 feet, and number 198 at 30,000 feet. I do not think we got over 10,000 feet of merchantable lumber out of the three piles. The lumber was badly damaged, warped, and short and broken pieces." It will also be observed that, while the quantity of lumber reported sold by McGavic was less than that stated in the invoice, the amount of shingles and lath sold exceeded by considerable the invoice statement. It will also be observed that the total amount realized was nearly the value of the property as fixed by the receiver's invoice. In view of the evidence before us, we think there is no reasonable basis for the complaint as to the amount of lumber reported sold by McGavic, and that the court below rightly so held.

The complaint next in order presented is not well grounded in the facts. It will be observed that by the contract the said McGavic is to "sell and dispose of said stock as, in his own judgment, may seem best." Now, the precise matters relied upon as grounds of complaint are that at times McGavic refused to sell lumber at market prices, the opportunity therefor being offered; that at other times he made sales to his friends and others at greatly less than market prices. No satisfactory evidence is brought forward to substantiate the first of the above mentioned assertions, and further attention thereto is not demanded. In respect of the latter assertion made, it appears that during the closing days of his conduct of the business McGavic made sales of some mixed lots remaining at a nominal price, and that the purchasers by sorting over obtained therefrom lumber and wood greater in value than the price paid. Fraud is not shown, and it is not even suggested that McGavic gained any personal advantage from any such transactions. We think it fair to presume that his course was dictated solely by a desire to close the business out, and thus save the expense of help, ground rent, insurance, etc. Indeed, as we read the evidence in the record, there is sufficient upon which to justify the assertion that the course pursued was in the direct line of economy, and therefore, in the interest of all parties concerned. In any view to be taken of the evidence, however, there is no warrant for holding that the trustee had not exercised his best judgment, or had abused the discretion with which he was clothed. A trustee is required to use that degree of care, skill, and prudence which a man of ordinary care, skill, and prudence would use in his own transactions, and with his own property under like circumstances, and such only. He is not liable for mere errors of judgment. He is not to be held as an insurer of the property itself, nor as a guar-

antor that any particular results will be worked out therefrom unless by special undertaking. Pomeroy's Equity, section 1070.

Passing to the matter next complained of, we find the facts to be that in respect of some orders received by him McGavic did not have all the grades or kinds of lumber called for. He accordingly made purchases

3. SAME. of other dealers to enable him to fill such orders. It is made to appear that such purchases were paid for by him from the trust funds in his hands. It further appears, however, that all sales made by him were for cash, and accordingly that there was an immediate return to his trust account of the money so paid out. Conceding that the matter of such purchases was not authorized by the letter of the written agreement under which McGavic acted, or, indeed, by the spirit thereof, still it is apparent that appellant suffered no legal damage on account thereof. Without damage, there can be no recovery of course. This is elementary.

In respect of the fourth ground of contention, the court below found that lumber, etc., belonging exclusively to appellant was included in that sold by McGavic, and the value of such lumber is fixed by the decree at \$517.25. That lumber belonging to appellant in his own right was taken and sold in some amount, is conceded in the evidence, and we think the value thereof as found is fully as great as the evidence in the case warrants. In view of the fact that defendants do not appeal, we may accept such amount as being correct.

By its decree the court below ordered payment of said sum of \$517.25, less one-half the costs of the case, to plaintiff. The balance then remaining in the hands of McGavic, after paying all costs and expenses, is ordered paid to defendant Goddard, it appearing that such amount will be insufficient to satisfy the amount due him under the contract. The decree meets with our approval, and it is **AFFIRMED**.

L. T. WISECARVER, Appellant, v. LONG & CAMP.

Negligent Use of Team: INSTRUCTION. In an action for injury

1 to a hired team, the court instructed that plaintiff must show both defendant's negligence and that such negligence was the direct cause of the injury, irrespective of the condition of the team before or after making the trip. *Held*, not erroneous as withdrawing from the jury evidence of the condition of the team on its return.

Want of Care: INSTRUCTION. In an action for injuries to a hired

2 team, refusal to instruct in substance that if the evidence discloses that the team was injured while in defendant's possession from a lack of ordinary care and prudence as shown by its condition when returned, then the plaintiff is entitled to recover, is error, though the time and place where the injury or want of care occurred does not appear.

Same. It is error, in an action for injuries to a hired team, to

3 refuse to instruct in substance that it is the duty of defendant to exercise ordinary prudence and care in driving the team and to observe their condition, and if he failed so to do and negligently drove them until injured, then defendant is liable.

Competency of Witness. A witness who dissected a horse, though

4 not a veterinary, but who states that from experience he is able to say whether the organs of the animal were in a normal condition, is competent to give his opinion on that subject.

Appeal from Jefferson District Court.—HON. M. A. ROBERTS, Judge.

FRIDAY, APRIL 10, 1903.

ACTION on account and also for loss of a horse and injury to another alleged to have been caused by the negligent driving of defendants' employe. The answer admitted the account, denied liability for damages to the team, and, by way of counterclaim, pleaded an account against the plaintiff, which was also admitted. Verdict and judgment for difference in accounts, but no allowance for damage to team. The plaintiff appeals.—*Reversed*.

Leggett & McKemey for appellant.

Rollin J. Wilson and *Wm. J. Ross* for appellee.

LADD, J.—On the 21st day of March, 1900, Long & Camp, who are merchants engaged in business at Fairfield, hired a livery team and light wagon of plaintiff, which their employe, Roy Fry, drove to Glasgow, a distance of about twelve miles. The object of the trip was to nail up advertising boards on the way and at that place. Incidentally a young lady, who has since become Fry's wife, rode with him. They left Fairfield within an hour from 12:15 o'clock p. m., and returned between 5:30 and 6:45 o'clock the same evening. One of the horses died before midnight, and the evidence tended to show that the other could not be used for several weeks, and was of much less value than before the drive. On the part of plaintiff the evidence introduced tended to show that the horses had perspired freely, but that the sweat had dried on them when they came in; that the one which died bore whip marks on its rump; that though the roads were bad the trip was made in about four and one-half hours, and that the horses appeared to have been exhausted by overdriving. On the other hand, defendant's evidence tended to show that the team was not urged or whipped, that the roads were good save in low places, and that the journey was not made in less than six and one-half hours. The court in the fourth paragraph of the charge instructed the jury that if the death of one horse or the injury to the other was caused by the negligence of Fry, damages should be allowed.

Appellant especially complains of the fifth paragraph, which reads: " But if plaintiff has failed to prove by the greater weight of the evidence both of said alleged facts,

1. NEGLIGENT use of team: instruction. to wit, (1) that the defendants' agent, Roy Fry, was negligent in the manner as alleged by plaintiff, and (2) that the negligence of said Fry, so

proven, was the direct cause of the alleged injury to said team, then the plaintiff cannot recover, and this is true whatever you may find the condition of said team to have been either just before or just after making said trip. The mere fact of the death of one horse and injury of another, without proof of the alleged negligence on the part of the defendants' agent, would not make defendants liable." This did not, as contended, withdraw the evidence of the condition of the horses upon their return from the jury, and ought not to be so construed. It goes no further than to say that, in the absence of a finding of Fry's negligence, or that his negligence, if found, was the cause of the injury, there can be no recovery, even though the horses were in a worse condition when returned than when received. This was tantamount to saying that, regardless of the condition of the team upon its return, defendant was not liable unless the change, if any, was occasioned by negligence on the part of Fry while in his possession.

II. The plaintiff of necessity relied largely on proof of the condition of the team when taken and when returned, with the inferences reasonably to be drawn therefrom. He was not bound to point out the specific respect in which Fry was negligent, save that it was in the management of the team or the particular place where the neglect occurred. This was the thought in the fifth instruction refused, which was as follows: "If you find from the evidence that the plaintiff's horses, which were hired to the defendants, were injured while in the possession of the defendants by the lack of such care as an ordinarily prudent man would give under like circumstances, then the defendants are liable for the injuries so done to said horses, though the evidence may not have shown to you when or where the overdriving or other want of care took place. It is sufficient if the evidence shows that the horses were actually injured by the lack of proper care in the management and driving, if such lack of care is

2. WANT of
care: in-
struction.

shown by their condition when returned by the defendants, though the proofs may not point out the exact spot at which, or the time when, the horses suffered by such mismanagement or want of care."

The horses were shown to have been healthy, five and nine years old, accustomed to going long distances, and to have been returned, after a few hours' drive, in a dying condition. From these circumstances, and the unusual result, the jury might well have inferred that they were the dumb victims of such cruelty or indifference on the part of their driver as amounted to negligence. If their changed condition was not such as might reasonably have been caused by a drive of that distance in a prudent manner, and was such as would ordinarily have resulted from overdriving or other misuse, we see no reason for not considering this fact as tending to establish negligence on the part of the person handling them.

III. Fry testified, in substance, that he took no notice of the horses. Plaintiff requested the court to instruct that: "It is the duty of the defendants' employe in driving the plaintiff's team to exercise such

3. SAME. care and watchfulness for them and their condition as a man of ordinary prudence would exercise while driving them, and if such employe failed to exercise such watchful care over the horses, and in fact did not notice their condition, and that they were becoming exhausted, when he might have observed that fact by the exercise of such care, and continued to drive them until they were exhausted, such lack of oversight and watchfulness was negligent, and defendants are responsible for it, and the injury shown by the evidence to have resulted therefrom." This instruction ought to have been given. The distance driven was twenty-four or twenty-five miles, and the jury might have found from the evidence that the employe failed to exercise proper care in observing the team and how they were enduring the drive.

IV. One Baldwin dissected the horse which died, and testified that from his experience he was able to say whether the different organs were in normal condition. He was not a veterinary surgeon, but had had considerable experience in dissecting horses and other animals, and said he was able to distinguish between healthy and diseased organs. He was then asked to describe the condition he found this horse in. An objection to his competency was sustained. An offer to prove by him that the organs were in a healthy condition met a like result. We think he ought to have been permitted to testify. Though not a veterinary, he appeared to have knowledge of the matters concerning which he proposed to speak. The fact that he had it from experience rather than from books ought not to disqualify him or exclude his testimony. That fact merely affected the weight to be given to his opinion. The evidence was material, as tending to show that the horse died from exhaustion rather than from disease.—REVERSED.

LEN M. ALLEN V. ADAMS COUNTY, Appellant.

Counties: RECORDER: RECOVERY FOR ASSISTANCE. Under Code, section 496, a county recorder cannot recover from the county for the services of an assistant, when the bill therefor is not filed at the next regular meeting of the board of supervisors after the rendition of the services.

Allowance of Compensation. In an action by a county recorder to recover for assistance, it is immaterial how much, if anything, the recorder paid the assistant, provided the bill is for services necessarily employed and the amount claimed is the reasonable value of the service.

Appeal from Adams District Court.—HON. R. L. PARRISH, Judge.

FRIDAY, APRIL 10, 1903.

ACTION by plaintiff, as recorder of defendant county, to recover compensation for temporary assistance rendered necessary in the discharge of the duties of his office by the pressure of business during the years 1898, 1899 and 1900. Trial to the court. Judgment for plaintiff for the amount claimed, \$533.25, from which defendant appeals.—*Modified and affirmed.*

M. E. Wilmarth, County Attorney, *D. H. Meyerhoff*, and *Burg Brown* for appellant.

W. O. Mitchell and *F. C. Okey* for appellee.

McCLAIN, J.—It is provided in Code, section 496, referring to the compensation of the county recorder, that, "in case no deputy shall be appointed, but on account of the pressure of business in his office the recorder is compelled temporarily to employ an assistant he shall file a bill for such services" at the next regular meeting of the board of supervisors, and the board "shall make reasonable allowance therefor." The necessity for the services for which plaintiff makes claim, the fact that such services were rendered, and the reasonable value thereof, were all determined by the trial court in rendering judgment for plaintiff, and the conclusions of the court in these respects are supported by the evidence. It appears, however, that the claim for assistance in 1898 was presented in one bill rendered at the end of the year, not quarterly at each meeting of the board of supervisors, and it is contended that the court erred in including in the allowance to plaintiff any amount claimed for that year, except so far as the assistance for which claim was made was procured during the last quarter of that year. This objection, however, was not made by the board, but the whole bill was disallowed, and the board refused payment of any amount for that year, the objection that bills had not seasonably been presented being raised for the first time on the trial of the case.

The section of the Code above cited provides that the recorder, in such case as here referred to, shall file the bill for such services with the board of supervisors "at their next regular meeting." It is urged that as to the provision relating to the filing of the bill at the next session the statute is directory only, but the language does not seem to fairly warrant that interpretation. It was no doubt the intention of the legislature that in the public interests, such a bill should be promptly and seasonably presented, so that the board might investigate it with opportunity to determine the necessity of the services, and whether actually rendered. We hold, therefore, that plaintiff cannot recover for all the services necessary in his office during the year 1898, but only for those specified in his bill as within the last quarter of the year. It appears from the evidence that during this quarter services were rendered for twenty-five days, and, computing the compensation at the amount per day allowed by the trial court, only \$37.50, instead of \$132.75, should have been allowed for the year 1898. This necessitates the deduction of \$95.25 from the amount allowed to plaintiff by the trial court.

Plaintiff's claim is for services in his office rendered by his wife, and it is contended for appellant that there is no evidence that payment for such services has ever been made by the plaintiff. Receipts given by the wife to the husband for the amounts claimed for services rendered during the years 1899 and 1900 were introduced in evidence, but it is said that there was no proof that plaintiff ever actually paid his wife anything on account of these services, nor that she has assigned to him her right to compensation. In answer to these contentions it is sufficient to say that the statute does not provide for the payment of a claim made by the person who rendered the services, but, on the other hand, directs that a bill for

such services be filed by the recorder; nor does it provide that payment be made to the recorder for money expended, but, on the other hand, requires the bill to be for the services of an assistant necessarily employed, for which the board is directed to make a reasonable allowance. We think the plaintiff made out his case when he showed that bills had been presented in his own name for services of an assistant necessarily employed, and that it is immaterial what amount he had paid, or whether he had paid anything. The board could, in any event, allow only the reasonable value of the services necessarily procured.

The modification already suggested requires that the cause be remanded to the trial court, with the direction that judgment be entered for \$441, instead of for \$536.25. Two-thirds of the costs are taxed to appellant, and the balance to appellee.—MODIFIED and AFFIRMED.

HENRY BITZER Appellee, v. THEODORE BECKE, THE BOARD OF SUPERVISORS OF MUSCATINE COUNTY, E. C. STOCKER, County Auditor, AND S. L. JOHNSON, County Treasurer, Appellants.

Homestead: SALE FOR TAXES. Under section 876 of the Code of 1878, a homestead not separately listed could be sold for taxes on other property belonging to the same owner.

Redemption From Tax Sale: EXTENSION OF TIME. Where a property owner before his right of redemption expires brings a suit in equity to enjoin the execution of a tax deed to his homestead, pursuant to a sale for an amount including the tax on other property, and tenders in redemption the amount he claims due and offers to pay whatever the court may adjudge, he should be granted a reasonable time in which to redeem after the amount due is determined, though the statutory period for redemption has expired.

Dissolution of Injunction: HARMLESS ERROR. Where in a suit to enjoin the issuance of a tax deed the court properly extended

the period for redemption at the time a demurrer to the petition was sustained, failure to then dissolve the temporary injunction was without prejudice.

Appeal from Muscatine District Court.—HON. W. F. BRANNAN AND HON. P. B. WOLFE, Judges.

FRIDAY, APRIL 10, 1903.

SUIT in equity to enjoin the execution of a treasurer's deed, pursuant to a tax sale of plaintiff's homestead for a sum, including taxes on personal property. A temporary writ of injunction was issued without notice. At the hearing, a demurrer to the petition was sustained, but the court fixed a time within which plaintiff might redeem, and continued the temporary writ. Subsequently, by supplemental petition, plaintiff alleged the making of tender, before the expiration of the statutory time of redemption, of the amount of the tax on the homestead separately, and further alleged a tender, after the former order of the court allowing a time within which to redeem, of the amount required for that purpose, and refusal of the auditor to accept the same; and asked for relief on that basis. A demurrer to the first division of the supplemental petition was sustained, but the court decreed that the acts of plaintiff in tendering the redemption money to the auditor, and, on the auditor's refusal to accept it, paying into the hands of the clerk of the court, constituted a redemption. Defendants appeal from the first order allowing plaintiff to redeem after the statutory period for redemption had expired, and from the subsequent order declaring the act of plaintiff pursuant to the first order a redemption.—*Affirmed.*

Jayne & Hoffman for appellants.

Richman & Richman for appellee.

DEEMER, J.—As plaintiff's homestead was not separately listed as provided in section 876 of the Code of 1873,

which was in force when the tax sale was made, the sale thereof for all taxes assessed against the owner, as well those on personal property as those upon the homestead itself, was valid. *Salter v. City of Burlington*, 42 Iowa, 531. The demurrer interposed against the original petition and the first division of the supplemental petition were, therefore, properly sustained.

Did the court err in granting plaintiff additional time to redeem? This is the pivotal point in the case. Plaintiff brought his original action before the statutory time had expired, but the demurrer to the petition was not ruled upon until afterward. He alleged in his supplemental petition that he had made a tender of the amount of taxes on the homestead before beginning his suit, and before the statutory time had expired; that he was ready and willing to pay whatever amount the court should adjudge necessary to entitle him to redeem; and that, after the ruling on the demurrer, he had made a tender of the amount of all the taxes to the county auditor within the time fixed by the court for redemption, which amount he had deposited with the clerk. He claims that, having commenced his suit before the statutory time had expired, having made tender of the amount which he claimed was due and averred a readiness to pay whatever amount the court should find due against the property, the trial court, in virtue of its inherent power had the right to extend the statutory period and to preserve plaintiff's rights during the pendency of the proceedings. It should be noticed that the action is in equity, and that plaintiff averred a readiness to pay whatever amount in redemption the court should adjudge was necessary. The statutory period had not expired at that time, and the only object in commencing the suit was to determine the amount which plaintiff should pay in order to redeem under the statute. For some reason, the case was not tried until after the statutory period had expired.

1. SALE of
homestead
for taxes.

2. REDEMPTION
from tax
sale: exten-
sion of time.

There is no evidence of bad faith on plaintiff's part, and the only question is, did the court err in granting plaintiff a short time—three days—in which to pay the amount necessary to redeem, as found by the court in its ruling on the demurrer? Ordinarily, an owner whose land has been sold for taxes must make redemption within three years from the date of sale, and he cannot insist on that right after the period has expired. Even though no deed has been issued, this rule obtains. *Pearson v. Robinson*, 44 Iowa, 413; *Long v. Smith*, 62 Iowa, 329. But there are many cases where, upon equitable grounds, the statutory period has been extended; as, for example, mistake of county officials (*Corning Co. v. Davis*, 44 Iowa, 622; *Noble v. Bulles*, 23 Iowa, 559); bad faith of party or attorney (*Lynn v. Morse*, 76 Iowa, 665); misconduct of county officials (*Shoemaker v. Lacey*, 38 Iowa, 277). There was no misconduct or mistake of officials in this case. Nor was there any bad faith on the part of the tax-sale purchaser. The mistake, if there was one, was of law, but even in such cases relief has sometimes been granted in other jurisdictions. *Manhattan Co. v. Richards*, 13 S. D. 377 (83 N. W. Rep. 425); *Harney v. Charles*, 45 Mo. 157; *McKay v. Smith*, 27 Wash. 442 (67 Pac. Rep. 982). If the case rested solely on equitable grounds, for example, plaintiff's mistake of law regarding the amount of taxes he should have paid in order to effectuate redemption, we should be inclined to sustain the action of the trial court in extending the period of redemption. Equitable circumstances, no matter how new or complicated, may justify a court in extending the right to redeem beyond the statutory period. On general principles, a court of equity may extend the time to redeem. *Teabout v. Jeffrey*, 74 Iowa, 28.

But there are stronger reasons than these for affirming the action of the trial court. Plaintiff commenced his action before the statutory period in order to secure an adjudication as to the amount he should pay in order to

effectuate a redemption, and averred a readiness to pay whatever amount the court should award. Ordinarily, a court of equity has power to preserve or continue a right, existing when the action is brought, until the termination of the litigation. If this were not true, many rights would be lost without any fault on the part of litigants. Plaintiff had a right to resort to the courts for a determination of the amount he should pay in order to redeem his property from tax sale. This right being conceded, it must follow, as a necessary conclusion, that, when action is brought to establish that right, a court of equity has power to enforce it, and to make its decree of some avail. Plaintiff tendered the amount he claimed was due, and offered to pay in redemption whatever amount the court should adjudge. He was not bound to tender the entire amount claimed, for this in itself would defeat his action. Moreover, actual tender is not required in equity. Averment of readiness and willingness to pay whatever amount should be found due is all that is required in this forum. *Taylor v. Ormsby*, 66 Iowa, 112; *Crawford v. Liddle*, 101 Iowa, 148; *Binford v. Boardman*, 44 Iowa, 53. For the purpose of the case, this offer, made before the statutory period had expired, was the equivalent of an actual tender of the amount of the taxes due.

Appellants' counsel rely with great confidence on *Long v. Smith*, 62 Iowa, 329. But in that case it appeared that the tax-sale purchaser was entitled to a deed on October 2, 1882. The holder of the legal title commenced his action to enjoin the tax-sale purchaser from giving notice of the expiration of the period of redemption, some time prior to this date, but he did not aver a readiness to pay the taxes and to reimburse the tax-sale purchaser until the 6th day of October, which was the date on which the decree was entered. The decision was made to turn on the fact that plaintiff did not offer to redeem until after the period of redemption had expired, and not until after

the time the purchaser was entitled to a deed. It is distinctly stated in the opinion that plaintiff did not offer to redeem until after the defendant became entitled to his tax deed. Of course, if one has let the time pass by within which to redeem, the court will not, in the absence of a showing of equitable circumstances, permit him to make redemption. This was the situation in the *Long Case*. But in the case now before us the plaintiff commenced his action before the time had expired, and averred readiness to pay whatever amount the court should decree. It would be a reproach to the law to say that under such circumstances the court could not make the necessary orders to preserve its jurisdiction and to render its decree effectual.

When the demurrer to the supplemental petition was sustained, the court should, no doubt, have dismissed the temporary writ of injunction, and its failure to do so was perhaps error. But the error was without
 3 DISSOLUTION
of injunction:
harmless
error. prejudice, for the court had inherent power to protect plaintiff in the rights decreed him, and could restrain defendants from taking their tax deed until the expiration of the three days allowed.

There is no prejudicial error in the record and the decree is **AFFIRMED**.

120	71
132	570

120	71
141	718

COLUMBIA ELLIS *et al* Appellees, v. SAMUEL NEWELL, Appellant AND FLORA NEWELL *et al* Defendants.

Advancement: GIFT: BURDEN OF PROOF. A voluntary conveyance to a child is presumed to be an advancement, and the burden is on him who claims it to have been a gift to establish that fact.

Subsequent Declarations of Donor: WHEN ADMISSIBLE. Subsequent
 2 declarations of the donor, not a part of the *res gesta*, are inadmissible to show that a conveyance to a son is a gift rather than an advancement.

Gift: EVIDENCE OF: In a suit for partition, the widow of intestate, who is a party thereto, is an incompetent witness to show that a transfer to a son was a gift rather than an advancement.

Appeal from Wapello District Court.—HON. M. A. ROBERTS, Judge.

FRIDAY, APRIL 10, 1903.

Suit in equity for the partition of real estate. From a decree finding that a conveyance of land from a common ancestor to defendant Samuel Newell was an advancement, he (Newell) appeals.—*Affirmed.*

W. R. Wilson and McNett & Tisdale for appellant.

Jaques & Jaques for appellees.

DEEMER, J.—T. J. Newell died intestate, August 19, 1900, seised of five hundred and eighty-eight acres of land in Wapello county, Iowa. He left surviving a widow, Margaret Newell, who is defendant in this case, ten children, nine of whom were daughters, seven of these being plaintiffs in the case and two defendants, and one son, Samuel, who is appellant. The action was brought to partition the lands belonging to the deceased at the time of his death. The widow's distributive share seems to have been determined in probate before this action was tried; but an appeal was taken by plaintiffs from the order allotting her share.

In January of the year 1900, T. J. Newell bought of one Dolts ninety-three and one-half acres of land, paying him \$3,500 therefor, but the title to the land was taken in the name of Samuel, who held it at the time of trial. The deed conveying the property is an ordinary warranty deed, for the consideration heretofore named, and it expressly recites that the consideration was paid "by T. J. Newell for Samuel Newell." Plaintiff contended, and

the trial court found, that this constituted an advancement to Samuel, which should be taken into account in making the partition.

Samuel Newell contends that the transaction was a gift, and that in addition thereto he should receive a share of the real estate. The value of the estate, after deduct-

1. ADVANCE-
MENT: gift:
burden of
proof. ing the widow's share and other charges, is about \$20,000, so that if the purchase price for the Dolts land is treated as an advancement

Samuel Newell has already received something like \$1,000 more than his share. The issue between the parties is thus sharply defined, and the law involved is well understood, except as it bears upon the admissibility of evidence in cases of this character. The nature of an advancement has been so often stated that we need not take up space with a definition of the term. Moreover, it is now well established doctrine in this state that a voluntary conveyance from parent to child is presumed to have been an advancement, and the burden is upon him who claims it to have been a gift to prove it.

The gist of the whole matter is the intent of the donor at the time of the transfer, and this may be established by his declarations prior to the time of the transfer or contemporaneous with it. *Middleton v. Middleton*,

2. SUBSEQUENT
declarations
of donor:
when inad-
missible. 31 Iowa, 153; *Phillips v. Phillips*, 90 Iowa, 541; *Cline v. Jones*, 111 Ill. 563; *Merkel's Appeal*, 89 Pa. 340; *Eastham v. Powell*, 51 Ark. 530 (11 S. W. Rep. 823); *Powell v. Olds*, 9 Ala. 861. But such declarations, like other admissions, are generally regarded as unsatisfactory evidence on account of the ease with which they may be fabricated, the impossibility of contradiction, and the consequences which the slightest mistake or failure of memory may produce. *Baker v. Leathers*, 3 Ind. 558; *Martin v. Town of Algona*, 40 Iowa, 390. Whether or not subsequent declarations made to a stranger are admissible is a proposition on which the authorities are in

hopeless conflict. When so close to the main transaction as to be part of the *res gestæ* they are no doubt competent, and whenever it may be said that they are against the interest of the declarant they are doubtless admissible. The character of the transaction is fixed when made; although an advancement may be changed to a gift. *Sherwood v. Smith*, 28 Conn. 516. But a gift cannot be converted into an advancement simply by the will of the donor. *Lawson's Appeal*, 23 Pa. 85.

Samuel Newell is relying upon certain declarations made by T. J., his father, long subsequent to the conveyance, tending to show that the transaction was a gift. The declarations were not part of the *res gestæ*, and, if admissible at all, the evidence being hearsay, it must be because such declarations were against interest. There are cases holding that they are. *Gunn v. Thurston*, 13th Mo. 339 (32 S. W. Rep. 654); *Watkins v. Young*, 81 Grat. 84; *McDearman v. Hodneit*, 83 Va. 281 (2 S. E. Rep. 644); *Autrey v. Autrey's Adm'r.*, 87 Ala. 614. But we do not regard these cases sound on principle or sustained by authority. The interest of the declarant, which makes his derogatory admissions or statements admissible, is a pecuniary or proprietary one, and even in such cases these declarations are not generally received when the title of a third person is involved. *Westcott v. Westcott*, 75 Iowa, 628; Greenleaf Evidence (14th Ed.) section 147; *County of Mahaska v. Ingalls*, 16 Iowa, 81; *Moehn v. Moehn*, 105 Iowa, 710.

Were the declarations said to have been made in this case by T. J. Newell after the deed to Samuel statements derogatory to any pecuniary, or proprietary interest held by him in the property? We think not. An advancement is a gift, and after it is made the donor has no interest whatever therein, although, as we have said, he might doubtless have converted it into a simple gift. But there is no claim in this case that he did so, and all the testimony offered had reference to the donor's intention at the time the deed was

made. Whether gift or advancement, the donor lost all pecuniary interest in the property.

The only parties in interest in such cases are the survivors of the donor. They, of course, had an interest in knowing whether or no the property should be brought into hotchpot or treated as a pure gift, but the donor had no further pecuniary or proprietary interest in it. Under the statutes of this state advancements for the purpose of distribution and division are treated as part of the estate, but for no other purpose. The donee cannot be required to refund any portion thereof, nor can they be taken for debts. Code, section 3888. Indeed, they create no right of property in the estate. *In re Will of Miller*, 73 Iowa, 118. T. J. Newell never at any time owned the property in this case. The conveyance was from Dolts to Samuel Newell, and the transaction was either a resulting trust, a gift pure and simple, or an advancement. His declarations to the effect that it was not a resulting trust were no doubt admissible for they would clearly be against interest, as in *Culp v. Price*, 107 Iowa, 136. But there is no claim of resulting trust in the case. The transaction was a gift or an advancement, and in either case the donor lost all interest in the property when the conveyance was made. This exact point was ruled adversely to appellant in *Thistlewaite v. Thistlewaite*, 182 Ind. 355 (31 N. E. Rep. 496.) See, also, *Frey v. Heydt*, 116 Pa. 601 (11 Atl. Rep. 585); *Hatch v. Straight*, 3 Conn. 81, (8 Am. Dec. 152); *Williams v. Williams*, 82 Beav. 370; *House v. Woodard*, 5 Cold. 201; Thornton on Gifts, section 587; *Rumbly v. Stainton*, 24 Ala. 712. In *Middleton v. Middleton*, 31 Iowa, 151, dying declarations of the donor were offered in evidence to show the character of the transaction. It was there held that such declarations were inadmissible. True, the discussion went to the point of their being admissible as dying declarations, but had they been admissible as against interest or as evidence of intent the court doubtless

would have so held. We do not think subsequent declarations, not a part of the *res gestæ*, are admissible to show that a transfer was a gift rather than an advancement.

II. But one other question of law is involved and that the admissibility of certain testimony from the widow, Margaret Newell, regarding personal communications and

3: GIFT: evi- transactions had with her deceased husband to
dence of: ad- the effect that the transfer in question was a
missibility. gift and not an advancement. The witness was a party to the suit, and under the express language of the statute she was an incompetent witness. *McCorkendale v. McCorkendale*, 111 Iowa, 314. In *Conger v. Bean*, 58 Iowa, 321, relied upon by appellant, the case as to the witness had in effect been dismissed. The widow was a proper party to this suit, and she was never dismissed therefrom. True, while this suit was pending she secured an allotment of her share in the probate court, but plaintiffs have appealed from that order to this court, and there is no reason for saying that she was not a party or interested in this suit. Her testimony was inadmissible.

III. Having now disposed of the law question, we go to the facts, in the light of the law thus announced, and with other well settled and undisputed rules in mind, have no difficulty in concluding that the decree of the trial court is correct. The whole doctrine of advancements is founded on the old equitable maxim that "equality is equity;" hence the rule that in such a case as this the transaction is presumed to be an advancement, with the burden on him who claims otherwise to prove it. We think defendant has failed to show that the deed was a simple gift to him. The testimony as to what occurred when the deed was made is clear and convincing, and points almost conclusively to the thought that an advancement was intended. Such evidence is much more potent than random statements, either before or afterward. Moreover, the conduct of Samuel has not at all times been

consistent with his present claim. The prior declarations made by T. J. Newell are about as consistent with one theory as the other. Taking the case as a whole, we are satisfied that the trial court arrived at a correct conclusion. It is not our custom to set out the evidence on which we base our conclusions, and there is no reason here for departing from the rule.

The decree of the district court is **AFFIRMED**.

J. J. CLEAVER, Appellant, v. **ELIZABETH MAHANKE et al.**

Vendor and Vendee: EASEMENT IN STREET: REPRESENTATIONS OF VENDOR: ESTOPPEL. Where a grantor sells and conveys lots describing them by metes and bounds, also by reference to the same as designated on a certain plat and represents that the lots are adjacent to a street which he points out on the plat, the grantee takes an easement in the street which the grantor is estopped to deny, even though the plat was not authorized by him, was not legal, and had never been recorded.

Appeal from Butler District Court.—**HON. J. F. CLYDE**, Judge.

FRIDAY, APRIL, 10, 1903.

ACTION in equity to require the defendants to remove a fence built by them across a street, and to restrain them from again obstructing the same. There was a judgment for the defendants. The plaintiff appeals.—*Reversed*.

Edwards & Camp for appellant.

Hemenway & Martin for appellees.

SHERWIN, J.—The plaintiff and the defendants are residents of Parkersburg, Iowa. Prior to and on the 8th day of March, 1894, the defendant Elizabeth Mahanke was the

owner of land abutting the east line of Church street, one of the streets of said town, but outside of the corporate limits. This land had never been platted by her, but in 1878 a plat of Parkersburg had been made by the then county surveyor of Butler county, Mr. J. G. Rockwell, and on this plat he had subdivided the defendants' land in question into lots and blocks, numbering the same, and indicating thereon street extensions both north and south and east and west. This entire plat seems to have been made at the instance of the auditor of the county, and was filed and kept in his office, but it was never recorded in the office of the county recorder, nor is it now claimed that it was a legal plat of the land in question. On the 8th day of March, 1894, the plaintiff and the defendant Elizabeth Mahanke entered into a written contract for the purchase and sale of two of the lots so platted by Rockwell, both lying immediately north of Third street as extended by the plat, the west one of the two abutting on Church street, and the other being immediately east thereof. The contract described the lots as follows: "Commencing at the southwest corner of Lot 'A' in Block 35, Taylors Addition to Parkersburg, Iowa; thence south along the east side of the street two hundred and sixty-four feet; thence east two hundred and sixty-four feet; thence north sixty-six feet; thence west two hundred and sixty-four feet; thence south sixty-six feet to point of beginning of the south line of this piece of land. Otherwise described as Outlots 94 and 112 on plat made by Rockwell at one time county surveyor, said land being in S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of Sec. 30—90—16, Butler County, Iowa."

The plaintiff went into possession of the lots under his contract, built a house and barn thereon, and otherwise improved the premises, all with reference to the lot lines and Third street as it was indicated by the Rockwell plat. Until some time in 1900, he used so much of Third street south of his lots as was necessary for the convenient use of

the property, at which time the defendant John A. Mahanke, who is the grantee thereof, built a fence across Third street along the line of Church street, and completely obstructed the plaintiff's use thereof.

There are at least two sufficient reasons why the plaintiff should be given the relief asked. It will be observed that the contract not only described the land conveyed by metes and bounds, but that it also describes it as "outlots 94 and 112 on plat made by Rockwell." This description of the lots and reference to the Rockwell plat must be held to be a recognition and adoption of that plat, not alone as to the particular land or lots conveyed, but as to all of its parts so far as it could affect the plaintiff's private use and enjoyment of the land purchased to such an extent that the defendants are now estopped from interfering therewith. It is a well recognized rule that, where land has been divided into lots, and a plat thereof is made showing such lots and the streets, and the owner sells lots so designated on the plat, the purchaser has an easement in such streets as are necessary for the full enjoyment and use of his property, of which the grantor cannot deprive him. *Fisher v. Beard*, 82 Iowa, 846, and cases cited therein; *City of Dubuque v. Maloney*, 9 Iowa, 450; *McFarland v. Lindekugel*, 107 Wis. 474 (88 N. W. Rep. 757); *Strunk v. Pritchett*, 27 Ind. App. 582 (61 N. E. Rep. 973.) Nor can the fact that the plat was not made or authorized by the grantor, or that it was not a legal or recorded plat, make any difference with the rule. It is founded upon the doctrine of estoppel, and, whether the plat be legal or illegal, authorized or unauthorized, if it be recognized, and adopted by the grantor in making the sale, and is relied upon by the purchaser, the estoppel is as effective as it would be were the conditions different. *Noonan v. Braley*, 67 U. S. 499, (17 L. Ed. 278). See, also, *Shea v. The City of Ottumwa*, 67 Iowa, 39; *Bartlett v. Bangor*, 67 Me. 460; *Strunk v. Pritchett*, *supra*; *Reno v. City of*

Iolo, 63 Kan. Sup. 885 (65 Pac. Rep. 678); *Rhodes v. Town of Brightwood*, 145 Ind. 21 (43 N. E. Rep. 942); *Town of Woodruff Place v. Rashig*, 174 Ind. 517 (46 N. E. Rep. 990); Elliott on Roads and Streets, section 117 (2d Ed.) But aside from the description of the lots in the contract, the evidence quite conclusively shows that the defendant induced the plaintiff to purchase by his verbal representations that there was a street south of the lots, and by pointing out to him the location of the lots and the street on the Rockwell plat before the contract was made. These facts are of themselves sufficient to create an estoppel under the authorities cited.

The motion to strike the appellee's additional abstract is sustained, and the judgment is REVERSED.

P. F. CONDON V. DES MOINES MUTUAL HAIL ASSOCIATION,
Appellant.

Hail Insurance: EVIDENCE: VERDICT. In an action on a hail insurance

- 1 policy plaintiff testified to the acreage of corn and the yield, and stated the amount of damage, while the evidence of defendant's witnesses, based upon measurement of the ground and cribs in which the corn was stored, showed a full yield. *Held*, the jury was justified in accepting plaintiff's estimate of the loss.

Proof of Loss: WAIVER OF RIGHT TO: INSTRUCTION. Where

- 2 plaintiff notifies the insurance company of the loss and it sends an adjuster, who accepts plaintiff's proposition of settlement and promises to report the company's action thereon, and where on renewed demand for settlement the company promises further inspection but fails to make it or notify plaintiff of its acceptance or rejection of his proposition, or to demand proof of loss before maturity of the claim, the company waives its right to require proof of loss.

Same. Where the insurance company, before suit, notified plaintiff,

- 3 whose corn was damaged by hail, to send it an account of the acreage covered by the policy and amount harvested, and the assured replied by giving the amount of the loss, to

which defendant said it would give the matter attention but failed to do so and denied all liability, it waived its right to demand a further account of the amount harvested.

Evidence: DAMAGE TO OTHER CROPS. In an action on a hail policy
 4 one of plaintiff's witnesses on cross examination stated the average yield of his own corn, and on redirect, without objection, that it was injured by hail. *Held*, not error to permit him to state that it was injured by the same storm which damaged plaintiff's crop.

Damages: OTHER FIELDS. In estimating the damage to a crop of
 5 corn by hail, the jury may consider the yield of other fields of similar kind and quality in the same vicinity.

Appeal from Webster District Court.—HON. S. M. WEAVER,
 Judge.

FRIDAY, APRIL, 10, 1903.

ACTION at law on a hail insurance policy. Trial to a jury, and verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed*.

Carr & Parker for appellant.

Healy & Healy and *M. J. Mitchell* for appellee.

SHERWIN, J.—The jury fixed the plaintiff's damages at \$76, and it is strenuously urged that the evidence fails to show any damage. The plaintiff testified as to the acreage
 1. **EVIDENCE:** of corn affected by the hailstorm in question,
 verdict. and as to the amount of corn harvested from the same. As to the first point, it may surely be said that the evidence was conflicting. The plaintiff was a farmer himself, and had owned the land in question for many years; and, if the jury believed that he was a truthful witness, it was justified in finding that he knew very closely the number of acres of corn he had in that year, even as against the testimony of the defendant's witness, who claimed to have figured out the exact amount of land

by driving over it and counting the rows of stalks in sight the next spring, and just before the trial. The same observation may be made as to the number of bushels of corn harvested altogether and placed in the crib. The plaintiff, by his own testimony and by that of several of his neighboring farmers, showed that his growing corn was materially injured by hail on the 6th day of July, and that when the crop was matured it yielded only about thirty-six bushels per acre, instead of forty-five or fifty—the estimated yield if it had not been injured—while by an exact measurement of the cribs after the corn was gone, and a mathematical computation of the number of cubic feet of corn in each one, it was urged that the plaintiff's crop amounted to fifty-seven bushels per acre, notwithstanding the hail. We are inclined to think that the defendant proved too much. At least, the jury seems to have taken the farmer's knowledge of his bushels, as well as of his acres, in preference to the figures of the defendant's witnesses, based partly upon their conclusions as to the fullness of the cribs, and other matters of which they had no knowledge. If we were sitting as jurors, we might be a little more coldblooded than the jury was, but we are not inclined to disturb their verdict.

Complaint is made of the first and fifth paragraphs of the court's instructions. They both relate to the question of waiver, and will be considered together. In the first it

2. PROOF of loss: waiver of: instruction. WAS said that if the plaintiff notified the defendant of his loss, and in response thereto it sent its adjuster to make a personal inspection thereof and settlement therefor, and he settled for the oats and denied any loss on the corn, but took plaintiff's proposition of settlement for the claimed loss, and promised to report to him the action of the defendant thereon, and that "thereafter, upon further demand by plaintiff, the defendant promised to send its adjuster again for further inspection and adjustment, but failed to do so, or to notify the plain-

tiff of its acceptance or rejection of his proposition, and that plaintiff, relying upon said promise, and pending settlement, failed to deliver an account of the crop harvested, and that the defendant at no time before the claim matured, on December 1st, asked or demanded that such an account be rendered, the defendant will be held to have waived its right to such an account." This instruction clearly covers the familiar doctrine of waiver, and its correctness as an abstract statement of the law is not seriously questioned. *Bloom v. Insurance Co.*, 94 Iowa, 359; *Dyer v. Des Moines Ins. Co.*, 103 Iowa, 524; *Soorholtz v. Farmers' M. E. Ins. Co.*, 109 Iowa, 522.

But it is said that the instruction had no facts in the record to support it. This is not correct, however, as we read the record. On the contrary, we think that the testi-

mony offered by the defendant as to its acts
 3. SAME. in sending its adjuster to the plaintiff, and as to his statements to the plaintiff when there, justified the instruction. The last of December the defendant wrote the plaintiff a letter, asking the number of acres of corn covered by its policy, and the number of bushels of corn husked therefrom. This letter was after the plaintiff had written several letters to the defendant, urging a settlement and the sending of the inspector as promised. The plaintiff answered the defendant's letter as follows: "W. S. Hazard, Sec.—Dear Sir: In reply to your letter of Dec. 31, I would say that I have not received your letter in which you say you sent blanks to estimate my corn nor did not expect such blanks. Perhaps you had better 'jog' your memory a little bit and see if you are not mistaken about sending them. Now Mr. Hazard if I am not mistaken my offer for settlement on corn at first was two dollars per acre, when you first came out to see me but since I started to harvest it I find that the least I can estimate my loss is ten bushels per acre for thirty-eight acres. As you know you sent your adjuster to settle

losses before harvested and you promised to send one in your letter of Sept. 17, in thirty days. I did not get a chance to arbitrate as is required but if you wish to settle with me without trouble I will be reasonable and just. If not I must take some other course. I will look for an immediate reply, as my loss should be settled before this time." Answering this letter, the defendant wrote as follows: "Dear Sir: Your letter of the 7th inst. to Mr. Hazard has been received, but he is out of the city at present, and will be for a few days. However as soon as he returns we will refer your letter to him for reply." These two letters closed the correspondence on the matter referred to therein, and the court instructed thereon as follows: "So, also, if you find that before suit was brought the association asked plaintiff to furnish it an account of the corn crop harvested, and that, in response, plaintiff sent in a writing or letter in which he attempted, in good faith, to comply with such request, and that upon receipt thereof the defendant notified him that it would soon give it attention but failed thereafter to object to said statement or demand a more formal or complete account of the crop, but denied all liability to the plaintiff, then said defendant will be held to have waived such further account, and cannot now insist upon such alleged failure of plaintiff as a defense to this action." It may be conceded that the plaintiff did not, in his letter of January 7th, give as full information as the request called for, and that he then had the knowledge requisite to give such information; but he did answer the question as to the acreage of corn and as to his loss, and the whole tenor of his letter indicates that he was expecting the defendant to comply with its promise to send an adjuster to determine such loss. If the defendant was not satisfied with this attempted compliance with its request, it should have so stated, but it made no objection thereto either in its answer of January 10th or later. Under the circumstances,

we think the instruction was properly given, *Green v. Insurance Co.*, 84 Iowa, 135; *Dee v. Ins. Co.*, 104 Iowa, 167.

There was no prejudicial error in permitting the witness Theur to testify on redirect examination that his corn was damaged by the same storm. On his cross-ex-

4. EVIDENCE: amination by the defendant he was asked the
damage to average yield per acre of his own corn, and on
other crops. redirect stated without objection that it was injured by hail.

The tenth instruction permitted the jury to consider
"the yield of other fields of similar kind and quality in
that neighborhood," in estimating the depre-
5. DAMAGES: ciation of yield suffered by the plaintiff.
other fields.

This was correct. *Barry v. Farmers' Mutual Ins. Co.*, 110 Iowa, 433.

We see no reversible error in the record, and the judgment is **AFFIRMED**.

IN RE THE ESTATE OF MATTHIAS FRAHM, Deceased, PAULO
RODDOWIG *et al*, Executors, v. JOHN STEFFEN, Guardian
of the Property of Matthias H. T. Frahm, a Minor,
Appellant, AND CATHERINE LANGE *et al*, Appellees.

120	85
139	225

Wills: CONSTRUCTION OF: STOCKS AND BONDS: LEGACY. Test-

1 ator died owning stock in a corporation, which he be-
queathed to certain heirs. Prior to his death he made an
arrangement with the corporation by which the same was to
be converted into bonds. Pending the issuance of the
bonds, however, a corporation note was to be given in
exchange for the stock. The stock was issued but not
delivered during the life of the testator, and his executors
exchanged the stock for the note. *Held*, the legatees were
entitled to the stock or the proceeds derived therefrom, under
the provisions of the will.

Legacy: STOCKS AND BONDS: ADEMPMENT. The acceptance by the
2 executors of a testator of a note which he agreed to take in
lieu of certain stock or bonds of a corporation owned by him
and bequeathed by his will, does not amount to an ademption
of the legacy.

Latent Ambiguity: PAROL EVIDENCE. Parole evidence is admissible
8 to explain latent ambiguities arising from a testator's contract
regarding his property.

Appeal from Scott District Court.—HON. JAS. W. BOL-
LINGER, Judge.

FRIDAY, APRIL, 10, 1903.

THIS is a proceeding for the construction of the will of Matthias Frahm, deceased. The guardian of Matthias H. T. Frahm, a minor, appeals from a decree finding that certain shares of stock, or the proceeds thereof, passed to legatees under the will. He contends that these shares of stock were not owned by the deceased at the time of his death, and that if, the deceased ever at any time owned them, the legacy has been adeemed.—*Affirmed.*

Alfred Clauson and W. M. Chamberlain for appellant.

Schmidt & Vollmer, Heinz & Fisher and Waldo Becker for appellees.

DEEMER, J.—By his will and the codicils attached Matthias Frahm provided, among other things:

"VII. All the balance of bonds and shares of stock of the Davenport Malting Co. owned by me and not specially bequeathed above or in my will I give and bequeath as follows: to wit:—One-thirteenth of said bonds and one-thirteenth of said shares of stock to each of the following parties to wit:—

"1st. party,—the heirs of Peter Frahm, deceased.

"2nd. party,—the heirs of Claus Frahm, deceased.

"3rd. party,—the heirs of Jergen Frahm, deceased.

"4th. party,—the heirs of Detlef Frahm, deceased.

"5th. party,—the heirs of Johann Frahm, deceased.

"6th. party,—the heirs of Hans Frahm, deceased.

"7th. party,—the heirs of Frederick Frahm, deceased.

"8th. party,—the heirs of Max Frahm, deceased.

"9th. party,—the heirs of Heinrich Frahm, deceased.

"10th. party,—Margaretha Siert.

"11th. party,—Christ Diehn.

"12th. party,—Catherine Lange.

"13th. party,—Peter Hartwigsen of Sioux County, Iowa, under this condition: Said Hartwigsen shall receive the income of this share during his life time, and after his death, this share shall pass to Mary Moeller and Willie Moeller, the two eldest children of Hans Moeller, being grandchildren of Peter Hartwigsen. * * *

"As I have either sold or given an option on my shares in the Davenport Malting Company at 65 cents and 75 cents on the dollar of the par value of the same, I herewith provide that wherever in my said will and codicil thereto, I have given a legacy consisting of a certain amount of said shares, in lieu thereof I now give and bequeath a sum of money equal to sixty-five per cent, of the par value of said shares, to take the place thereof."

In other provisions of the will testator disposed of \$175,000 worth of bonds and \$18,700 worth of stock to other legatees. He in fact had at one time an interest in the Davenport Malting Company, a corporation, amounting to \$50,000, so that, had he retained his interest until his death, there would have been an interest of \$13,800 in that corporation which would have passed under the clauses of the will we have quoted, or gone into his general estate for disposition under other clauses of the will or as provided by statute.

There is little or no dispute regarding the facts, and such as are regarded material we shall here state: The original will was drawn November 28, 1895. The first codicil, from which we have quoted, was made August 16, 1897, and the last November 19, 1898. It appears from the evidence that in October of the year 1894 the testator, who, with his son, was engaged in conducting a brewery, entered into an arrangement with a number of other men,

who were engaged in a like business, to consolidate their plants into a corporation to be known as the Davenport Malting Company. Testator's interest in the new concern was fixed at \$50,000, which was to be placed to his credit until stock or some other evidence of his holdings should be issued to take its place. Thereafter it was agreed between the parties in interest that each should receive for the property he had turned in, equal parts of stock and bonds for his interest. In other words, Frahm was to receive \$25,000 in stock and \$25,000 in bonds. Finding that such a large indebtedness would be illegal, an arrangement was made whereby each was to receive sixty-five per cent. of their interest in stock and thirty-five per cent. in bonds, and that, as soon as conditions would permit, each stockholder might exchange an amount of stock not exceeding fifteen per cent, of his total holdings for bonds of the corporation in an amount equal to the full value of the stock. In November of the year 1898 some of the holders of interests in the consolidated concern, including testator, petitioned that corporation to carry out its contract, and execute negotiable notes for the unissued amount of bonds coming to them. Some time prior to the presentation of this petition testator sold two hundred and fifty shares of stock in the corporation to one Koehler, and this, in a measure, at least, explains the third codicil of the will, from which we have quoted. Shares of stock were filled out on the company's books as follows: To Matthias Frahm one for two hundred and fifty shares and another for seventy-five shares. Appellant contends that the certificate for the seventy-five shares was never delivered, but more as to that hereafter. After the death of Frahm, which occurred November 29, 1898, the executors of his will took a note from the Davenport Malting Company for \$7,500, which they now hold, and which is in reality the subject-matter of this litigation.

The trial court found that the legatees under the provisions of the will we have quoted were entitled to the seventy-five shares of the stock, or the proceeds therefrom, including the note we have mentioned, and all dividends and income therefrom. Appellants contend that deceased never owned seventy-five shares of stock in the Davenport Malting Company, and that nothing passed under the provisions of the will quoted. They also contend that, as no bonds were ever issued, the note or the money derived therefrom could not pass under the will, and that, in any event, as the testator, before his death, made a contract by the terms of which he was to take a promissory note in lieu of stock or bonds, the legacy was adeemed.

It will be noticed that at the time of the making of the will and codicils quoted two certificates of stock had been issued in favor of Frahm, one for two hundred and fifty shares and the other for seventy-five, and that bonds had been issued to him in the sum of \$17,500. Before the making of the last codicil quoted he had sold the certificate for the two hundred and fifty shares, but the exchange of the seventy-five shares for the \$7,500 note had not at that time been made. He had joined in a petition asking for such a change, but this was not in fact made until after his death, when the executors really made the exchange. Neither the bonds nor the certificates of stock were taken by any of the persons interested therein. They were left with the corporation, pursuant to an agreement among the parties in interest, in order that the original agreement to take half in stock and half in bonds might be carried out. Under the agreement the testator was entitled, whenever the indebtedness of the corporation would permit, to have seventy-five shares of the stock issued to him converted into bonds of the company. He never in fact received but \$17,500 in bonds, although, under the original arrangement, he was entitled to \$25,000.

1. CONSTRUCTION of will: stocks and bonds: legacy.

He sold \$25,000 of his stock, or the certificate for the two-hundred and fifty shares before making the last codicil to his will, which is the last paragraph we have quoted; hence his reference therein to his sale of stock.

The note which lies at the bottom of this controversy was issued pursuant to the following resolution passed by the directors of the malting company corporation in response to the petition hitherto mentioned, which was signed by Frahm and others: "Motion by Herman Wolf, seconded by George Mengal, to carry out our contract formed at the time of the consolidation to hold equal parts of stock and bonds, and to issue to owners for that part still due in bonds, notes payable on or before two years from January 1, 1899, at five per cent interest per annum."

Did the seventy-five shares of stock, or the note issued in lieu thereof, pass under the will to the thirteen legatees named? Appellant says, "No," because the stock was never delivered to Frahm, and, if it had been, he (Frahm) had at the time of his death made an agreement to take the note of the company in lieu thereof, and that this right or this note could not and did not pass under the will. The will passed all the balance of the bonds and stocks owned by him (testator) to the thirteen legatees. At the time of his death there had been issued seventy-five shares of stock, which were convertible into bonds of the company, and for which the company had agreed at some time to issue its promissory note. Construing the will in the light of these facts and the other evidence in the case, we are abidingly satisfied that the testator intended the seventy-five shares of stock which stood in his name to pass to the thirteen legatees. True, he had signed a petition requesting that a note be issued in their place, which had been accepted by the company; but no note had in fact been issued, and there is little doubt that he intended this \$7,500 interest, no matter what its form, to pass under the paragraphs of the will quoted. The evidence introduced

in support of this contention is practically conclusive. That the stock certificate had not in fact been actually delivered to Frahm before his death is not regarded as controlling. It had been issued, was shown on the books of the company and was left with it for the purpose of carrying out the original contract between the parties. As such it passed under the will. *Angell v. Springfield Home*, 157 Mass. 241; *Cummings' Estate*, 158 Pa. 397 (25 Atl. Rep. 1125); *Ellis v. Eden*, 25 Beavan, 482.

II. But it is said the legacy was adeemed by the contract for the conversion of the stock into a note of the company. The general rule is that, when a chattel specifically bequeathed by a testator is sold or conveyed by him during his life, the legacy is adeemed. *Unitarian Society v. Tufts*, 151 Mass. 76 (23 N. E. Rep. 1006, 7 L. R. A. 390). But slight or immaterial changes in the form of the property bequeathed will not work an ademption, *Brady v. Brady*, 78 Md. 461 (28 Atl. Rep. 515); *Prendergrast v. Walsh*, 58 N. J. Eq. 149 (42 At. Rep. 1049). Nor does the rule apply to general legacies. *Littig v. Hance*, 81 Md. 416 (32 Atl. Rep. 343). We are inclined to the view that the legacy here was specific, in that the testator refers to particular bonds and stocks, and that the bequest could not be satisfied by the delivery of bonds or stocks of any other kind. *Davis v. Close*, 104 Iowa, 261; *Unitarian Case*, *supra*; *McFaddin v. Heffley*, 28 S. C. 317 (5 S. E. Rep. 812, 13 Am. St. Rep. 675.) What then, of the petition to take a note in place of the stock and bonds, which had been accepted by the company before the testator's death? Did this work an ademption? We are constrained to hold that it did not. At the time of his death Frahm was still the owner of the shares of stock, which were being held by the company, it is true, for the purpose of carrying out the original agreement to convert them into bonds, and his petition to issue a negotiable note in lieu thereof had been accepted by the company, but no

2: LEGACY:
stocks and
bonds: ademp-
tion.

note had been issued, nor was there any definite contract as to when it should be. The conduct of the executors after the death of Frahm would not, of course, adeem the legacy. *Patton v. Patton*, 55 N. C. 494. There had been no substitution in fact of anything in place of the stock, and the mere right to substitute would not work an ademption. By the later authorities the question is made to turn to some extent at least on the intent of the testator. *Swails v. Swails*, 98 Ind. 511; *Beall v. Blake*, 16 Ga. 119; *White v. Winchester*, 6 Pick. 48. Giving effect, then, to the testator's intent as deduced from the will itself and from the evidence regarding the subject-matter both before and after the will was executed, we have no difficulty in arriving at the conclusion that the legacy was not adeemed. As supporting these views, see, also, *In re Bradley's Will*, 73 Vt. 253 (50 Atl. Rep. 1072).

Parol evidence was admissible in this case for the purpose of identifying the subject-matter. In view of the various contracts and agreements made by the testator with reference to his bonds and stocks in the corporation, there was a latent ambiguity, which could be explained by parol evidence. *Eckford v. Eckford*, 91 Iowa, 55; *Chambers v. Watson*, 60 Iowa, 339; *Decker v. Decker*, 121 Ill., 341 (12 N. E. Rep. 750); *Brandon v. Yeakle*, 66 Ark. 377 (50 S. W. Rep. 1004). The evidence makes the intent of the testator clear, and distinctly negatives the thought that he purposed an ademption.

III. Some matters of practice are argued by appellant. They do not seem to have been raised in the trial court and consequently cannot be considered here. All these matters seem to be ruled adversely to him, however, by *Schoening v. Schwenk*, 112 Iowa, 733.

The court correctly construed the will, and its decree is **AFFIRMED**.

S. G. HAMILTON, v. M. K. SMITH, Appellant.

Partnership: FIRM NOTE: RELEASE OF RETIRING MEMBER. In an action against a former member of a partnership on a note given by the firm, where the defendant pleaded and testified that in adjusting partnership affairs after the dissolution of the old firm, in consideration of defendant's stepping out of the business and turning it over to the new firm, the plaintiff agreed to look to the new firm for payment of the note, it was error to instruct that in order to find for the defendant it must appear that the agreement to release was made at or before the dissolution, as there was no such issue.

Appeal from Story District Court.—HON. J. R. WHITAKER,
Judge.

FRIDAY, APRIL 10, 1908.

ACTION on a note, resulting in judgment against defendant, from which he appeals.—*Reversed.*

McCarthy & Lee for appellant.

G. A. Underwood for appellee.

LADD, J.—On the 27th day of February, 1899, Bigelow & Smith executed to plaintiff their promissory note, payable on or before July 1st following, and recovery for the balance remaining unpaid is sought against Smith. He interposed the defense that about February 10, 1900, the above firm was dissolved, and succeeded by Biglow & Bigelow, to whom plaintiff agreed to look for the payment of this note and release defendant therefrom, and that, "as a consideration for said agreement, he turned over his interest in the property of the firm of Bigelow & Smith to Bigelow & Bigelow." Appellant insists that the issue with respect to consideration was not properly submitted to the jury. For the purpose of determining this question, it will be necessary to set out the testimony of defendant: "I retired from the firm of Bigelow and Smith the

22d day of February, 1900. The business was closed February 10th, but we did not get settled up until the 22d. * * * When I retired from the firm I arranged with Mr. Hamilton that he should carry the note against the new firm of Bigelow & Bigelow. * * * He said it was not necessary to draw up a new note; that he would look to the new firm. The new firm agreed to pay these old obligations, and it was with the understanding that Mr. Hamilton would look to the new firm and release me that I stepped out of the business and turned it over to the new firm. * * * I do not remember the time of the day, nor the date of the conversation. It was along about the time I went out; before I went out; along about the settlement. The time, I don't just remember—between the 1st of February and the 22d." It is clear from this that the witness claimed the arrangement was made before he formally turned over his interest to the new firm, and this probably happened after the dissolution of Bigelow & Smith. Apparently, it occurred on the 10th of February, and what was done thereafter was in the way of settling and adjusting the affairs of the partnership. This is somewhat confirmed by his further statement that "we had fixed up some other matters, and that remained unsettled. He was around there most of the time while we were invoicing, and he said that will be all right; he would carry it along, and take the new firm for it." Evidently this understanding is not claimed to have been had before dissolution of Bigelow & Smith, but before defendant's property was turned over to Bigelow & Bigelow.

A dissolution of a partnership does not necessarily involve the disposition of its property, nor a settlement between partners. The power to wind up its business, settle its accounts, and distribute the assets continues after dissolution. *The Western Stage Co. v. Walker*, 2 Iowa, 504. See note to *Gilmore v. Ham*, 40 Am. St. Rep. 562. Nevertheless the court instructed the jury, in the

fifth paragraph of the charge, that, in order to find for the defendant, it must appear from a preponderance of the evidence that "at or before the time of dissolution of the firm of Bigelow & Smith" the agreement to release was made. In the next instruction they were told that the only legal consideration alleged was the turning over of defendant's interest in the firm property, and if they found that, "at or before the time that firm of Bigelow & Smith was dissolved, it was agreed by the plaintiff and defendant that plaintiff would release the defendant, and look to the firm of Bigelow & Bigelow for the payment of said note, if defendant Smith would turn over to said firm of Bigelow & Bigelow" all Smith's interest in the property, a verdict should be returned for defendant. The distinction between dissolution and turning over his interest in the firm's property is thus clearly recognized, and in the seventh paragraph they were further advised that, in event the agreement was made after the dissolution of the firm, there was no consideration, and the defense must fail. We do not find the issue presented to have been raised in the pleadings or evidence. It is nowhere claimed that the agreement with plaintiff had any connection with the dissolution of the firm of Bigelow & Smith, and it was immaterial whether the arrangement was before or after that event. The evidence is all but conclusive that it was afterwards. The consideration, however, which was pleaded, and to which defendant testified, was that, in adjusting the partnership affairs after the dissolution of the old firm, the defendant, in reliance on plaintiff's promise to look to the new firm alone for the payment of the note and release him, he "stepped out of the business and turned it over to the new firm." This issue, rather than the time of the agreement, if any there was, relative to dissolution, should have been submitted to the jury.—
REVERSED.

WEAVER, J., took no part.

F. E. PERRY, Appellee, v. CLARKE COUNTY, Appellant.

Bridges: CROSSING WITH ENGINE: USE OF PLANK: CONFLICT IN

1 EVIDENCE. In a suit for injuries sustained by the breaking of a highway bridge while crossing the same with a threshing engine, where the evidence is in dispute as to whether the wheels of the engine were upon running plank as required by statute, the question presented is for the jury to determine.

Evidence: CONCLUSION OF WITNESS. In an action for injuries

2 sustained while crossing a bridge, a witness should not be permitted to state as a conclusion whether there was another crossing plaintiff might have gone over "without any trouble," and such testimony is also improper where there is no showing that the same is a public way or known to plaintiff.

Contributory Negligence. The fact that plaintiff examined the

8 bridge and assisted in making some repairs before crossing, or that he rode the engine while crossing, did not, as a matter of law, render him guilty of contributory negligence, where the real defect was not apparent.

Defective Bridge: WANT OF NOTICE: NEGLIGENCE. When a bridge

4 maintained by a county becomes weakened and dangerous from natural decay, which the exercise of reasonable care would have revealed, the county cannot rely upon want of notice to relieve it from liability for injury.

Notice of Injury: SUFFICIENCY OF. In an action for injuries from

5 a defective bridge, it is only necessary for the plaintiff to file with the county auditor a notice in substantial compliance with Code, section 3447, giving the time, place and circumstances of the injury in reasonably specific terms, to entitle him to bring his action after the expiration of ninety days from the date of the injury.

Appeal from Union District Court.—HON. H. M. TOWNER,
Judge.

FRIDAY, APRIL 10, 1903.

ACTION at law to recover damages for personal injury.
Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

W. S. Hedrick for appellant.

J. S. Banker, Sullivan & Sullivan and Stivers & Slaymaker for appellee.

WEAVER, J.—On the 22d of October, 1900, the plaintiff was moving a traction engine along a public highway in Clarke County, and, while crossing a county bridge upon the line of his travel, said structure gave way, precipitating the plaintiff and engine into the gorge below. In the fall the plaintiff was pinioned beneath some portion of the engine, from which position he was not rescued for several hours, resulting in very severe physical injuries, and much pain and suffering, for which he seeks to recover damages. He alleges that the bridge was old, decayed, weakened, and unsafe for public use, of which condition the county had notice, but failed to use reasonable diligence to remedy the defect, and that by reason of such negligence the accident occurred, without contributory negligence on his part. The defendant denies the plaintiff's claim, and further alleges that the injury to plaintiff occurred more than three months prior to the commencement of this suit, and that no written notice specifying the time, place, and circumstances of the accident was served upon the defendant within sixty days from the date thereof as provided by law. It also avers that plaintiff, by his negligence, contributed to the injury of which he complains.

The evidence was such the jury would be justified in finding that the bridge had been built about the year 1884, with some repairs in 1895; that its parts were weakened by natural decay; and that plaintiff, being in the service of one Zink, the owner of a steam threshing outfit, approached the bridge with the engine from the east on the morning of the day of the accident. Before attempting

to cross, the engine was stopped, and plaintiff and Zink went forward to examine the bridge. They concluded that the floor was too badly worn to be safe. At this time a member of the defendant's board of supervisors happened to arrive, and, on being asked, responded that he "thought the bridge safe, as it had just been repaired." He proposed, however, to furnish some new plank if Zink would lay them; and, this proposition being accepted, the most of the day was consumed in obtaining the material and making this repair. Some examination was also made of the stringers. When the new plank were laid, plaintiff and Zink, having four sound plank, such as the statute provides shall be used in moving an engine across a bridge, laid them lengthwise upon the west end or bent of the bridge, properly gauged to carry the wheels of the engine, and for the rest of the distance used for this purpose the old plank taken from the bridge, and laid double. Plaintiff then mounted the engine, and moved slowly upon the bridge. He passed safely over until upon the west or last bent, and was on the new plank, when the supporting stringers gave way. There is evidence on the part of defendant tending to show that the engine wheels did not follow the extra plank laid for their accommodation, thus subjecting the bridge to a greater strain than would otherwise have been produced; but this was a matter of dispute in the testimony, which was properly submitted to the jury. It appeared, or at least there was some evidence, that the stringers gave way at the west end, where they lay upon the sill, and were more or less covered and obscured by the earth approach; one witness saying that "the joists at the west end, where they rested on the cap, were almost rotted in two," but that, owing to the dirt, this condition would not be noticed by looking at them from the outside.

I. The first point made by the appellant is that at the time of the accident the wheels of the engine were

not upon the running boards, as required by the statute
1. USE of plank: which permits the use of public bridges by conflict in evidence. traction engines. Code, section 1571. If the fact relied upon by the appellant were conceded or shown without dispute, the conclusion for which it contends could not well be avoided; but, as we have already said, while there was evidence in support of defendant's claim in this respect, there was other evidence, both direct and circumstantial, to justify the opposite conclusion. The question as thus presented was guarded by an appropriate instruction, and properly submitted to the jury.

II. Error is assigned upon the ruling of the court in excluding certain testimony. One of defendant's witnesses was asked: "Now, Mr. Stalker, tell the jury whether or
2. EVIDENCE: conclusion of witness. not there was a crossing—a way they might have gone either above or below the bridge without any trouble?" An objection to this as immaterial and incompetent was sustained; the trial judge suggesting that, to render such proof admissible, the fact should have been pleaded. Without deciding whether the reason assigned for the ruling is or is not sound, we think there was no error in excluding the answer to this and other questions of like import. The inquiry does not ask simply as to the existence of another route between the same points, or for its description, but further calls for the opinion of the witness whether it was one the plaintiff "could have used without any trouble." If the fact of the existence of another route was competent at all, it was for the jury, and not the witness, to say whether it was such a one as the plaintiff could have used without unreasonable trouble or delay. Moreover, there was no offer to prove that such other way was a public way, or was pointed out or was known to the plaintiff or to his employer.

III. It is said the plaintiff is shown to have been guilty of negligence, because, as is alleged, he knew the

unsafe condition of the bridge. It is true, he examined and assisted in replanking it before attempting to cross. This fact, instead of showing negligence, as a matter of law, tends to sustain his claim that he was exercising prudence and care. It may be admitted, of course, that if the defective or rotten condition of the bridge was so plain to casual observation that such examination as he gave it ought to have revealed the defect, and to have warned him against risking the passage, then he was negligent, and should not recover, but whether such condition did exist was for the jury to determine. It is further urged that he was negligent in riding the engine across the bridge. It appeared from the testimony of some of the witnesses that an engineer may dismount from his engine and send it across a bridge alone, but there was no such showing as would render it proper for the court to say that a failure to pursue such course was negligence. Indeed, to the uninitiated, it would seem that to send an engine across a bridge alone, expecting it to guide itself along the running boards which the statute requires to be used, would be taking chances savoring of rashness. We are clear that there was no error in permitting the jury to say whether the conduct of plaintiff in this respect was that of a reasonably prudent engineer.

IV. The question of notice to the county of the condition of the bridge was also one of fact. The bridge was made of pine lumber and plank, and had been built about sixteen years at the time of the accident, though it had been repaired and in some part rebuilt in 1895. It is a matter of common knowledge that such materials, when exposed to the weather, and especially where they come in contact with the moist earth, decay with considerable rapidity; and the law charges the party having a public bridge of that kind in its care with the duty not only of making the structure reasonably safe originally, but also with the

3. CONTRIBUTORY negligence.

4. DEFECTIVE bridge; want of notice; negligence.

duty of reasonable inspection of the same from time to time as it advances in age and presumable deterioration. If a bridge stands for such a length of time that the natural processes of decay have weakened it to the point of danger, and the exercise of reasonable care in oversight and inspection would have revealed such condition to the proper officers, the county cannot rely upon the want of notice as excusing it from the charge of negligence. It is held to have notice of whatever defects which reasonable diligence in the discharge of its duties would have brought to its attention. *Huff & Buck v. Poweshiek Co.*, 60 Iowa, 529; *Padelford v. Eagle Grove*, 117 Iowa, 616. This is, in effect, the rule applied by the trial court, and we think it right, both upon principle and authority.

V. It will be observed that the accident occurred upon October 22d, and suit was brought January 30th thereafter—a period of more than three months. Under our statute, three months' delay in bringing suit will bar the action, "unless written notice specifying the time, place and circumstances of the injury shall have been served upon the county within sixty days from the happening of the injury." Code, section 3447. It is denied that such notice was served. It is shown, however, without controversy, that on December 17, 1900, and within less than sixty days from the happening of the accident, a written claim or petition was filed with the county auditor, and directed to the board of supervisors of Clarke county, in the following words:

"Osceola, Iowa, December 17, 1900.

"To Board of Supervisors of Clarke County, in Account with F. E. Perry, Dr.: To personal injuries caused by defective bridge, about one-fourth mile West of J. W. Miller's home, in Ward Township, Clarke county, Iowa.

"Your petitioner further states that on the 22nd day of October, 1900, while crossing said bridge with a threshing machine engine, that said bridge gave way, and that

he was carried to the bottom of the creek with said engine, landing on his legs, and other parts of his person, causing permanent injury.

"Therefore, I ask that said county pay me for said injury the sum of fifteen (\$15,000) thousand dollars.

"I swear that, to the best of my knowledge and belief, the above account is just and true and wholly unpaid, except some expenses unknown to this agent.

"[Signed]

C. E. Thompson, Agent.

"Subscribed and sworn to before me December 17, 1900.

"[Signed]

Edgar Bell, Auditor."

We see no good reason for saying this paper does not fill the demand of the statute for a written notice. It is not entirely formal, perhaps, but the substance is there. It gives notice of the accident, and of the time, place, and circumstances, in reasonably specific terms, and was received and filed in time by the officer upon whom notice could properly be served. To hold that this is not a substantial compliance with the statutory requirement would be excessively technical, and serve no just purpose. The fact that the paper is called a "petition," instead of "notice," is immaterial. It is the effect of its contents, and not its name, by which we are to be governed in its application. Neither is it material that the paper is verified by the affidavit of an agent. The statute does not require the notice to be sworn to, and, if verification is necessary, there is no reason why it may not be made by any person knowing the facts.

We find no reversible error in the record, and the judgment below is **AFFIRMED**.

**J. Y. LUKE, Administrator, Appellant, v. AEIKO KOENEN
AND TRIENTZE KOENEN.**

Notes: DEEDS: WANT OF CONSIDERATION: BURDEN OF PROOF.

- 1 Under Code, section 3069, both a note and a deed import a consideration, and the burden is on the party affirming want of consideration for either to show it.

Transaction With Deceased Person: COMPETENCY OF WITNESS.

- 2 Where defendant is sued on a note given to one since deceased, he is an incompetent witness on the question of want of consideration for the note, under Code, section 4604.

Want of Consideration: FAILURE OF PROOF. The fact that de-

- 3 'fendants testify that the \$1,200 note and conveyance of eighty acres of land in question by them to plaintiff's intestate were given to defeat the collection of a claim for \$56 against one of defendants, then in litigation, is insufficient to show that the note and deed were without consideration.

Laches: WHEN WILL DEFEAT RECOVERY. Where it appears that

- 4 the payee's administratrix lived only two years after the maturity of a well secured note drawing ten per cent. interest and the succeeding administrator dies before the estate is closed, equity will not defeat a recovery on the ground of laches in the absence of proof that defendants have suffered thereby.

Self-Serving Declaration. A writing, the relevant portion of

- 5 which is a self-serving declaration, is inadmissible.

Practice: DISMISSAL OF APPEAL. In an equitable action a motion

- 6 to dismiss an appeal because error is not assigned will be overruled.

*Appeal from Franklin District Court.—HON. J. R.
WHITAKER, Judge.*

FRIDAY, APRIL 10, 1903.

ACTION in equity to recover on a promissory note, and asking the foreclosure of a bond for a deed. Defense, want of consideration for the note, and a cross petition

asking that title be quieted in the defendants. There was a judgment for the defendants, from which the plaintiff appeals.—*Modified.*

Jno. M. Hemingway and *J. Y. Luke* for appellant.

E. P. Andrews for appellee.

SHERWIN, J.—The note sued on was given by the defendant Aeiko Koenen on the 10th day of August, 1887. It is for \$1,200 with interest at ten per cent., and was due August 10, 1892. Its execution and delivery to the plaintiff's decedent, C. C. Cowell, is admitted, but it is claimed that it was without consideration, and given under the following circumstances: That prior to the 25th day of February, 1887, the defendant Aeiko Koenen had become a surety on the note of another for about \$150; that suit was brought on that note against him, and that on said 25th day of February he deeded the land in question to said C. C. Cowell for the purpose of defeating the collection of any judgment which might be obtained against him, and that at the same time he gave Cowell his note for \$1,100, without any consideration therefor; that the note in suit here was afterwards given in place of the former one, and was also without consideration. Attached to the note in suit was a written statement over the signature of Cowell, as follows: "Hampton, Franklin County, Iowa, August 10th, 1887. I, Christopher C. Cowell, have this day given to Aeiko Koenen a bond for a deed to the south $\frac{1}{4}$ of the northwest $\frac{1}{4}$ section of 4, Township 92, Range 21, and taken his note for \$1,200. He honestly owes me \$800. The remaining \$400 is to cover a note and mortgage formerly given by Aeiko Koenen on the above described premises. If Aeiko Koenen pays the former mortgage of \$400 and \$800 to Christopher C. Cowell, he will be entitled to a deed."

Cowell died in June, 1889, and, as is frequently the case, the courts are called upon to determine the merits of

a controversy between the representative of the dead and the living whose claim is based upon transactions with the deceased. Under section 3069 of the Code, and numerous decisions of this court, the note in suit imports a sufficient and valid consideration, and the burden of proof is upon the defendant to show that it was without consideration. This is also true as to the deed from the defendant to Cowell.

Both of the defendants testified as to the giving of the \$1,100 note, and as to the execution and delivery of the deed to Cowell. If their testimony is considered at all, it

2. **TRANSACTION with deceased person: competency of witness.** furnishes the only evidence as to the note, and shows that the execution thereof and of the deed was one transaction. But these witnesses were both incompetent to testify to this transaction with Cowell, under the Code, section 4604, and their testimony relating thereto cannot be considered.

Rejecting this testimony, there is practically nothing before us sustaining the claim of the defendant as to the note. It is true there is some testimony tending to show

2. **WANT of consideration: failure of proof.** that Cowell had taken the deed in question for the purpose of aiding the defendant in defeating a debt which he claimed he should not pay, but this testimony falls far short of proving satisfactorily that Koenen did not owe Cowell a just debt. Indeed we think the entire evidence of the defendants, including the incompetent testimony to which we have referred, fails to prove a want of consideration for the note given at the time the deed was executed, or for the one in suit. The defendant was contesting the suit which he says was the cause of the conveyance of the land to Cowell, and as a matter of fact the judgment obtained thereon against him was about \$56, with costs; and for this small amount he, his brother, and another were liable. It was rendered against him before the note in suit was given and was subsequently paid by one of the

other judgment defendants. It requires some credulity to believe that one would give his note for \$1,200, and permit a voluntary conveyance of eighty acres of land, worth at least \$1,600, to stand for years for the purpose of defeating so trifling a judgment against him on the debt of one of his relatives. The testimony as to statements made by Cowell that he was assisting Koenen in defeating the claim is entitled to but slight consideration. Such testimony is generally weak and unsatisfactory, and it appears more so than usual here, given as it was some twelve or fourteen years after the statements are claimed to have been made, and by parties who never had any interest in the transaction.

At first blush it appears that the plaintiff's claim is stale, the note becoming due in 1892, and suit not having been brought until 1900. But when it is considered that

4. **LACHES:** the note was drawing ten per cent. interest, when will defeat recovery. and was in fact well secured by the deed given in connection with it, and, further, that the wife of O. C. Cowell was his administratrix, and only lived two years after the note became due, and that the administrator who succeeded her died before the estate was closed, it is apparent that it is not an ordinary case of neglect, if any at all is shown. Furthermore, there is nothing in the record tending to show that the defendants are the sufferers by such delay, but rather that the estate is at a disadvantage on account thereof. Cowell and his wife are dead, and the administrator who followed the wife is also dead; while, on the other hand, the defendants do not appear to have been prejudiced by the delay. Equity will not defeat a recovery on the ground of laches unless it is clearly demanded in the interests of justice.

The writing attached to the note we do not think competent proof for the appellant, because the only part thereof relevant to the real issue here is a self-serving declaration, and not one against the financial interest of the deceased in any sense of the term.

5. **SELF serving declaration.**

That the note in suit represents a valid indebtedness to the Cowell estate of \$800, we do not doubt. Such being the case, the plaintiff should have judgment for that amount, with interest thereon from the 25th day of June, 1889, at the rate of ten per cent. per annum. Figured to the 1st of March, it amounts to \$1,892.28. This judgment is decreed to be a lien on the land in question, subject only to that of the first mortgage of \$500 and whatever interest may be due thereon.

On the appeal from the order refusing a new trial on account of newly discovered evidence, we have to say that we do not think a showing of sufficient diligence was made, and that the ruling was right for that reason. The motion to dismiss because error is not assigned is overruled because of the equitable issue presented by the pleadings, and because of the fact that the case was tried as an equitable cause without objection.

The judgment, as modified, is **AFFIRMED**.

WEAVER, J.—Taking no part.

ADAM KIEFER, Appellant, v. EDWARDS M. GILLETT, CORA L. GILLETT, EDWARDS M. GILLETT, Administrator of the Estate of Emma L. Gillett, Deceased.

Wills: DOWER. Under section 2452 of the Code of 1873, an acceptance of the provisions of a will did not bar the wife's dower right unless the will so expressly provided, or there was an inconsistency between such right and the provisions of the will.

Dower: CONSTRUCTION OF WILL. Testator bequeathed to his wife and daughter the use of his farm so long as they desired to manage it, but if it should be sold, the proceeds were to be divided equally between the wife and his two children "the part so given to my wife to be in lieu of her dower". The wife died without any disposition of the farm. *Held*, the provision "in lieu of dower" related to a disposition of the

proceeds of the sale of the farm; that the provisions of the will were not inconsistent with her right to dower in the land, and that she became the owner of a one-third interest in the land which upon her death was subject to her debts.

Appeal from Buchanan District Court.—HON. A. S. BLAIR,
Judge.

FRIDAY, APRIL 10, 1903.

ACTION in equity to subject an interest in certain real estate, alleged to have been the property of one Emma L. Gillett, to the payment of a claim against her estate. The lower court dismissed plaintiff's petition, and plaintiff appeals.—*Reversed.*

Cook & Leach for appellant.

Springer & Smith for appellees.

MCLAIN, J.—In 1887 one Albertus Gillett died, leaving a will, the portions of which so far as necessary to an understanding of the present controversy are as follows:

"I give and bequeath to my daughter, Cora L., one thousand dollars, to be paid out of my personal property.

"I give and bequeath to my beloved wife, Emma L., all my household furniture and all the rest of my personal property, after paying the legacy already named to my daughter, Cora L.

"I also give and bequeath to my wife, Emma L., and my daughter, Cora L., the use of my farm, consisting of two hundred acres of land, together with the buildings and improvements on the same, so long as they may wish to manage the same, either by renting or hiring hands to work the same, but if they should not wish to so manage it, either by renting it or hiring hands to work the same, then it shall be sold and the proceeds therefrom shall be divided

equally between my wife, Emma L., my daughter, Cora L., and my son, Edwards M.; the part so given to my wife to be in lieu of her dower."

In 1888 Emma L. Gillett was appointed executrix of said will on her application, and in 1893 she was granted a final discharge; it appearing in the meantime that sufficient personal property had been collected to pay the devise to Cora L. Gillett. The proceedings show no disposition whatever of the real estate mentioned in the will. In 1900, Emma L. Gillett died. Cora L. Gillett and Edwards M. Gillett, who are made defendants in this action, are the children of Emma L. Gillett and Albertus Gillett, already referred to. Edwards M. Gillett is also defendant as administrator of his mother's estate. Plaintiff has filed a claim against the estate, and seeks to subject to the payment thereof a one-third interest in the real property mentioned in the will of Albertus Gillett; contending that Emma L. Gillett died seised of that interest, either as a dower interest therein, or by the provisions of the will. A construction of the effect of the will upon the dower interest will dispose of the controversy involved in the present case.

By section 2452 of the Code of 1873, which was in force at the time of the death of Albertus Gillett, and until after the discharge of his widow as executrix, it is

provided as follows: "The widow's share
1. DOWER. cannot be affected by any will of her husband, unless she consents thereto within six months after notice to her of the provisions of the will by the other parties interested in the estate, which consent shall be entered on the proper records of the district court." Under this Code provision it was held in many cases, and without conflict as to the general rule to be applied, although with some difficulty as to the application of the rule in particular instances, that the acceptance of the provisions of the will did not bar the wife's dower right,

unless the will so expressly provided, or there was some necessary inconsistency between the dower right and the provisions of the will. These cases need not be cited, as the rule is well understood. It is to be noticed that such rule is no longer in force, having been expressly changed by section 8270 of the present Code.

Conceding that the widow accepted the benefits of the will as above set out, the question is whether there was any inconsistency between the benefits derived by the widow from the will and her dower interest, which would amount to an election on her part to release such dower interest. The devise of all the personal property of the deceased after paying the legacy to the daughter Cora was not inconsistent with a distributive share in the personalty, inasmuch as what was given to the widow by way of devise was greater than the share she could have taken in the personal property had there been no devise to her. The only possible contention that the interest of the widow under the will was in lieu of dower must be based on the words "the part so given to my wife to be in lieu of her dower." But it will be noticed that these words are used immediately following and in connection with the power given in a certain event to sell the real estate, and divide the proceeds equally between the widow and the two children. Those words have evidently reference only to such sale and distribution. If the real estate had been sold under the provisions of the will, and the proceeds distributed, the widow receiving one-third, then that share was to be in lieu of her dower interest. But as nothing was done towards carrying out this provision, and the estate was wound up and the executor discharged without a sale of the land, it necessarily results that, whether we regard the will as impliedly giving to the widow and each of the two children one-third of the real estate by way of devise, or as leaving the real estate to be treated as property undisposed of by the will

2. DOWER: construction of will.

in the event that there should be no sale and distribution of the proceeds, the widow became the owner in fee simple of a one-third interest in this real property. Such one-third interest is, of course, subject to the payment of valid claims against her estate, and plaintiff is therefore entitled to have it subjected to the payment of his claim.

The decree of the lower court was erroneous, and the case is remanded for a decree in accordance with this opinion.—REVERSED.

E. E. Wood, Appellant, v. EDWARD COAD, *et al.*

Taxation: RIGHT OF REDEMPTION: PREMATURE DEED. Code, section 1441, absolutely fixes the time for redemption of property sold for taxes to ninety days after completed service of notice, and this time is not extended by the premature issuance of a tax deed.

Appeal from Woodbury District Court.—HON. JOHN F. OLIVER, Judge.

FRIDAY, APRIL 10, 1903.

ACTION in equity to redeem from a tax sale. Judgment for the defendants. The plaintiff appeals.—*Affirmed.*

R. M. Dott for appellant.

J. W. Hallam for appellees.

SHERWIN, J.—The land which the plaintiff seeks to redeem was sold on the 2d day of December, 1895, for the taxes of the previous year. On the 22d day of October, 1898, a notice of the expiration of the right of redemption was duly served; and this notice, together with an affidavit of service duly made, was filed in the county treasurer's office of Woodbury county on the 26th day of October, 1898, and duly recorded. No redemption was made or attempted

until this suit was brought, in September, 1900. On the 24th day of January, 1899, the treasurer issued a tax deed to the defendants, and in February, 1901, another one.

The sufficiency and regularity of the redemption notice, the return, and the affidavit of service are not questioned. But the appellant contends that, because the deed was issued prematurely, he still has the right to redeem. This position, however, is not sound. The statute fixes the owner's right to redeem, and by that he must be governed. Section 1441 of the Code provides for the service of a notice of expiration of the right of redemption after two years and nine months from the date of the sale, and limits the right of redemption to ninety days after the service of such notice is complete as therein provided. This limit of time we have held absolute for and against the owner where prior proceedings have been regular and legal, and the simple right to redeem is involved. *Pearson v. Robinson*, 44 Iowa, 413; *Ellsworth v. Low*, 62 Iowa, 178; *Long v. Smith*, 62 Iowa, 329. And these cases dispose of the appellant's contention, as we view the matter, for the issuing of a deed before the expiration of the statutory period cannot possibly affect the owner's right. All that he is required to do is to make his redemption or deposit his money therefor within the time and in the manner provided by law, and he is absolutely protected. Nor can it make any difference to him whether the certificate holder takes his deed as soon as he is entitled to it or not, because it is not the execution or non-execution of the deed which fixes the time within which he must redeem. It is the completed service according to law, and the filing of the notice of the expiration of his right to redeem, which starts the limitation of time against him, and nothing else. *Swope v. Prior*, 58 Iowa, 412, is not in conflict with this view, or with the cases cited herein. There it was stipulated, among other things, that the affidavit of service of the expiration notice was not made by the persons designated

by the statute. It was, in legal effect, no notice, as had been repeatedly held, and consequently the plaintiff would have ninety days from the filing of a statutory notice; and such, only, is the holding of that case. The same observation may be applied to *Bowers v. Hallock*, 71 Iowa, 218; *Ellsworth v. Van Ort*, 67 Iowa, 222; and *Stevens v. Murphy*, 91 Iowa, 356.

We do not further discuss the question of the subsequent deed issued by the treasurer to the defendants, because we deem the subject entirely foreign to the issue before us.

The judgment of the district court is **AFFIRMED**.

ELLA SELENSKY v. THE CHICAGO GREAT WESTERN RAILWAY COMPANY, Appellant.

Railroads: ACCIDENT AT CROSSING: SIGNALS: EVIDENCE. In an

1 action for damages occurring at a railway crossing, the testimony of witnesses who were in a position to hear, that they heard no crossing signal, and of another that he did hear signals, creates a conflict of evidence which it is the province of the jury to determine.

Positive and Negative Testimony. The testimony of witnesses
2 that they did not hear a signal, who have the same opportunity for observation as those who say the signal was given, is not negative but positive, and entitled to equal weight with the affirmative statement.

Contributory Negligence: REASONABLE CARE. Where there is
3 evidence of obstruction of a railway crossing which raises a doubt whether plaintiff could or could not in the exercise of reasonable care have avoided the accident, the question of contributory negligence should be submitted to the jury.

Same; INSTRUCTION. An instruction which assumes that plaintiff
4 knew that the view of an approaching train was obstructed and therefore it was her duty to stop and look and listen, where from the evidence such obstruction is an open question, should not be given.

VOL. 120 IOWA.—8.

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Special Instruction. A special instruction which is sufficiently covered by the general instructions need not be given.

Evidence in Chief: ADMISSIBLE TO CONTRADICT. The evidence in chief of a witness that immediately after an accident he accused the conductor of a failure to sound the crossing signal, to which no response was made, is admissible to contradict the conductor in case he should testify that the signal was given, if guarded by proper instructions.

Appeal from Bremer District Court.—HON. CLIFFORD P. SMITH, Judge.

FRIDAY, APRIL 10, 1908.

ACTION to recover damages for personal injuries received at a highway crossing as the result of a collision with defendant's train. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

Long, Hugerman & Farwell and *Miller & Williams* for appellant.

Sager & Sweet for appellee.

McCLAIN, J.—The collision occurred at a grade crossing. Plaintiff relied on evidence that the defendant's employes were negligent in the operation of the train, in that they failed to give the crossing signals as required by statute. For defendant it was contended that the crossing signals were given, and that plaintiff was not free from contributory negligence; having driven upon the crossing without taking proper precautions to ascertain whether a train was approaching.

The employes of defendant in charge of the train at the time of the accident, and other witnesses, testified to hearing the signals, while plaintiff and her husband, who was not with her in the conveyance, but was not far away from the crossing, and other witnesses who were in the neighborhood of the crossing at the time of the accident, testified that the

1. ACCIDENT at crossing: signals: evidence.

crossing signal was not given, and that the first signal was the danger signal, when the engineer saw the plaintiff about to drive across the track. Counsel for appellant invoke a rule which has received countenance in some cases in this state and elsewhere, to the effect that, as between positive evidence on the part of witnesses who are in a position to hear that a signal is given, and negative evidence on the part of other witnesses, similarly situated, that they have heard no such signal, there is not a conflict in the evidence; the so-called negative evidence having no weight as against the positive evidence of those who testified that they actually heard the signal. But it appears in this case that the plaintiff was looking out for signals, realizing that the crossing was a dangerous one, and knowing that a train was due about that time; that her husband knew that plaintiff would reach the crossing about that time, and was also on the lookout for any indications of an approaching train; that another witness heard the signal of the train about two miles away, and then the danger signal, but did not hear any signal at the whistling post. Under the circumstances, we think that the testimony of witnesses who were thus in a situation to hear, and likely to have heard, a crossing signal, if one had been given, that they did not hear any such signal, cannot be entirely ignored and treated as of no weight because opposed to the testimony of witnesses who say that a signal was actually given, or that they heard such a signal given. *Anaker v. Chicago, R. I. & P. R. Co.*, 81 Iowa, 267; *Lee v. Chicago R. I. & P. R. Co.*, 80 Iowa, 172; *McMarshall v. Chicago R. I. & P. R. Co.*, 80 Iowa, 757; *Reed v. Chicago St. P., M. & O. R. Co.*, 74 Iowa, 188. In the case of *Payne v. Chicago & N. W. R. Co.*, 108 Iowa, 188, it is said the fact that plaintiff and others did not hear the crossing whistle sound did not even create a conflict with positive evidence that the signals were given; but the facts in that case were different, for it appeared that the witnesses for

plaintiff who testified they did not hear the crossing signal were not in a situation to hear, or were not noticing for the purpose of hearing such a signal. We cannot say in this case that there was no evidence as to defendant's negligence. Nor can we say that the question was not properly submitted to the jury.

The court was asked, in behalf of defendant, to instruct the jury that the testimony of witnesses that they did not hear the signals, or that such signals were not given, was negative evidence, entitled to less weight than the affirmative evidence of witnesses who testified that the signals were given, or that they heard them. This instruction was properly refused. As between two witnesses listening at the same time for a signal, the testimony of one that no signal was given is just as much affirmative evidence as the testimony of the other that it was given. As already indicated, the rule has no application as between witnesses having equal means and opportunity of observation, and giving the matter equal attention.

It is contended that plaintiff was, under the evidence, as matter of law, conclusively shown to be guilty of contributory negligence in going upon the track at a place of danger. It does appear that at one place, as she approached the railway crossing, she could have seen the train, and that at no place did she stop to look or listen, and that before she had become aware of the approach of the train she had driven on a slow trot towards the crossing, until she was too near to avoid the danger by stopping her horse. But it is not, as matter of law, negligent in one approaching a highway crossing to fail to stop, unless there are circumstances which would indicate that stopping was essential in ascertaining whether there was danger. *Moore v. Chicago, St. P. & K. C. Ry. Co.* 102 Iowa, 595. It is true that, if the view of the track had been unobstructed, the testimony of the

2. POSITIVE and negative testimony.

3. CONTRIBUTORY negligence: reasonable care.

plaintiff that she looked and listened would be so manifestly inconsistent with and overcome by the evidence that she drove into a place which was dangerous on account of the approach of a train which she could not have failed to see and hear had she used her senses, that the court would disregard it. But on the other hand, if the plaintiff knew the view to be obstructed, it would be her duty to look out for an approaching train by exercising reasonable care, in view of the obstruction; and, under such circumstances, it might be necessary to show that she stopped for the purpose of looking and listening. *Crawford v. Chicago G. W. Co.*, 109 Iowa, 433; *Haughton v. Chicago & G. T. R. Co.*, 99 Mich. 308 (58 N. W. Rep. 314). Plaintiff testifies, however, that she did listen, and could have heard the crossing signal, had it been given, and could, with such warning, have escaped the danger. There is also testimony that she ought to have seen the train approaching, while, on the other hand, there is evidence tending to show that at that time the bank along the railroad track was so grown up with weeds that it was impracticable for her to see the train. The conflict in the testimony as to this fact made the case one proper for submission to the jury. When, by reason of obstructions or circumstances calculated to divert the mind of one approaching the track, it is not manifestly clear to every reasonable person that the plaintiff was negligent (that is, if the question is one as to which reasonable men may honestly differ) then the case is one for the jury; and we think it clear that, in view of the partial obstruction of the track, raising a doubt as to whether plaintiff could or could not, in the exercise of reasonable care, have seen the approaching train, and whether she was exercising reasonable care in driving along the highway towards the crossing in the expectation of hearing the crossing signal if the train should be near, it was not error to submit the question of the plaintiff's contributory negligence to the jury. *Artz v. Chicago, R. I. & P. R.*

Co., 34 Iowa, 153; *Laverenz v. Chicago R. I. & P. R. Co.*, 56 Iowa, 689; *Funston v. C. R. I. & P. R. Co.*, 61 Iowa, 452; *Lorenz v. Burlington C. R. & N. R. Co.*, 115 Iowa, 377.

The considerations which have just been suggested also dispose of objections to the refusal of the court to give instructions asked. Those instructions were predicated

4. SAME: instruction.

on the assumption that plaintiff knew the view of the track to be so obstructed that she could not see an approaching train, and that it was therefore her duty to stop for the purpose of looking and listening. But as we have seen, it was an open question whether she could see an approaching train. The testimony for defendant tended to show that she could have seen the train if she had looked. If this testimony was to be believed, then the negligence was not in failing to stop, but in failing to look. There is no necessity of stopping where the view is unobstructed, and by simply looking, without stopping, it can be determined whether a train is approaching. Whether plaintiff was negligent in assuming that she could see and hear a train, if it was approaching, without stopping, in view of the nature of the obstruction, or partial obstruction of her sight by the weeds on the embankment, was clearly a question for the jury.

A special instruction was asked in view of testimony tending to show an admission by plaintiff, immediately after the accident, that she heard the train approaching,

5. SPECIAL instruction.

but thought that she could get across the track in safety. But this point is sufficiently covered by the general instruction that, if plaintiff saw or heard the train approaching in time to stop or turn and avoid the collision, she could not recover. Certainly the common sense of the jury would enable them to apply such an instruction to the evidence relied on, if they believed it to be true.

A witness who was allowed to testify for the plaintiff stated that immediately after the accident he spoke to the

trainmen, including the conductor, and charged them with not having whistled for the crossing, and that no response was made by the conductor or any one else to this accusation. The court explained to the jury that the witness was allowed to testify as to this statement to the conductor only as tending to contradict him if it should turn out that, as a matter of fact, he did testify that the signal by the whistle was given for the crossing; and the jury were told that they could only consider the statement of the witness if they found that the conductor heard what the witness said, and knew that it was addressed to him, and acquiesced in it. We think there was no error in this ruling. The court carefully guarded against the failure of the conductor to respond being taken as an admission of anything by the defendant, and the conductor did subsequently testify that the signal was given.

Other errors are assigned, but they seem not to be of sufficient importance to justify separate consideration. The case was properly presented to the jury by the court, and the judgment is **AFFIRMED**.

RURAL INDEPENDENT SCHOOL DISTRICT NUMBER TEN, PALESTINE TOWNSHIP, STORY COUNTY, IOWA, Appellant, v. NEW INDEPENDENT SCHOOL DISTRICT OF KELLEY *et al.*

120	119
139	25
142	12

Schools: FORMATION OF INDEPENDENT DISTRICT: CONSTRUCTION OF
 1 **STATUTE.** A portion of a rural independent school district may be included with part of a school township and a new independent district formed under Code, section 2794, although there will remain in the independent district thus severed less than four sections of land, and in so construing said section it may be necessary to extend its provisions to include independent districts.

Construction of Statutes. The rule that a statute cannot be
 2 extended by construction to cover a *casus omissus* is not recognized in the interpretation of remedial statutes.

Amendment of Statute; EFFECT. Action by the legislature in
 8 amending a statute to make it conform to a particular case is
 not an admission that it did not originally cover such a case,
 which will prevent a judicial interpretation giving it the
 same effect as the amendment.

Change of Boundaries. Time does not settle the boundaries of an
 4 independent district so that they cannot be changed according
 to law.

Appeal: ADJUDICATION. Where the subject of litigation was ap-
 5 pealed to the state superintendent and the same conclusion
 reached by him which the court arrives at, it is not necessary to
 determine whether the remedy by appeal is exclusive or con-
 stitutes an adjudication binding upon the court.

Appeal from Story District Court.—HON. S. M. WEAVER,
 Judge.

FRIDAY, APRIL 10, 1903.

SUIT for an injunction to restrain the defendant from
 exercising jurisdiction over any portion of the plaintiff
 district, as originally constituted, and to restrain the
 officers of the district and of the county from certifying,
 levying and collecting taxes for said defendant district
 within the limits of territory originally included in the
 plaintiff district. Decree for defendants. Plaintiff ap-
 peals.—*Affirmed.*

Thos. H. Cheshire for appellant.

Ole O. Roe for appellees.

McCLAIN, J.—Long prior to 1900 the township of
 Palestine, in Story county, was divided into independent
 school districts, of which the plaintiff is one, including
 within its territorial limits sections 5, 6, 7, and 8 in town-
 ship 82 north, range 24 west. In the year 1900 the incor-
 porated town of Kelley was formed in a lawful manner,
 including within its limits the south three-fourths of
 sections 31 and 32, and the west one-half of section 33,

in township 83 of the same range, and the northwest quarter of section 4, and the north half of sections 5 and 6; all being in township 82. It will thus appear that the township line between Palestine township and the township north of it, to wit, Washington township, ran east and west through the new town, dividing it into two not quite equal parts. The territory included in the corporation situated in Washington township was, for school purposes, a part of the school district of Washington, that township not having been divided into independent districts. Soon after the organization of the town of Kelley, petition was made by the requisite number of electors to the board of directors of the school township of Washington to define the boundaries of a new independent district, coextensive with the limits of the town of Kelley; and action was taken, as authorized by Code, section 2794, to create such new independent district. The plaintiff independent district questions the legality of these proceedings, by which it was attempted to take a portion of the territory included within its original limits, and unite it, with the other territory included within the limits of the town of Kelley, into a new independent district.

The question is whether Code, section 2794, which provides for such a proceeding, is applicable to this case; that is, whether that section, which provides for a petition

to the board of directors of the school township in which the larger number of inhabitants of the town reside, for the creation of a district at least coextensive with the town

limits, and composed of territory of the school township to which the application is made and an adjoining school township, is applicable where the town includes territory which is a part of one or more independent districts.

One objection urged is that, by this severance of territory from the plaintiff district, it will be reduced in size to less than four sections of land; and counsel for plaintiff

1. FORMATION
of independ-
ent school
district: con-
struction of
statute.

contends that it is impossible for an independent district to exist, consisting of less than four sections of land, save under the contingencies specified in Code, section 2798, which relates, however, to subdivision of an existing independent district by concurrent action of the boards of directors of the two districts, and contains the additional stipulation that, save in two contingencies there mentioned, neither resulting independent district shall be reduced in size to less than four sections of land. It is not true, however, that, as a general proposition, an independent district loses its corporate capacity if, in accordance with any lawful provision, it is reduced to less than four sections in size. Code, section 2793, provides that the boundary lines of contiguous independent districts within the same civil township may be changed by concurrent action of the respective boards of directors, provided that the independent district from which the territory is detached shall, after the change, contain not less than four government sections. Thus, in two sections of the Code it seems to be indicated that four sections of land should be the minimum size of an independent district, although in one of these sections a smaller size is authorized under certain circumstances. But the provisions of Code, section 2791, authorizes the county superintendent to attach portions of one school corporation to another where by reason of natural obstacles any portion of the inhabitants of the one cannot, with reasonable facility, attend school in their own corporation, and there is no limitation under this section to a reduction of an independent district to less than four sections. In our judgment, the reduction in size of the plaintiff independent district to less than four sections of land will not prevent its continued existence, and does not constitute any obstacle to the incorporation of the defendant district.

But perhaps a more serious difficulty in applying of provisions of Code, section 2794, to this case, results from

the fact that the language of that section does not have any reference to independent districts. But if this objection is valid, then it is indeed far-reaching, and necessitates the conclusion that when the Code of 1897 was adopted it was not intended that a city, town, or village embracing any portion of the territory already included in an independent district should be formed into one new independent district. There is no other provision, so far as we can discover, for forming an independent district out of a portion of a school township and a portion of an independent district already created, save as the county superintendent may be authorized to effect this result under Code, section 2791, relating to the annexation of a portion of one school corporation to another on account of natural obstacles. But it seems to have been the policy of the legislature, as evidenced in the statutes for many years past in force in the state, to allow the people of a city, town, or village to constitute themselves into an independent district, regardless of the previous school organization covering the territory which is incorporated therein. Thus, in 1858 (see chapter 52, page 57, Act 7th General Assembly, section 1) provision was made for creating a separate school district out of each incorporated city or town, including the territory annexed thereto for school purposes. It is to be noticed that at this time there was no such school corporation known to the law as an independent district; the unit of school government being the school township, with its internal subdivision into subdistricts. In 1862 the school laws were revised, and while the civil township was retained as the school district, and divided into subdistricts as before, it was provided also (sections 84-91, chapter 172, pages 221, 222, Acts 9th General Assembly) that any city or town containing within its limits not less than three hundred inhabitants, and certain territory contiguous thereto, might be constituted as a separate school district, and the separate district thus formed was referred

to as an independent district. The statutory provisions contained in subsequent revisions of the school laws relating to the creation of the territory of cities, towns, or villages, together with such contiguous territory as may be included therein, into a separate or independent school district, seem to have been all based on the provisions of the act of the Ninth General Assembly, already referred to, which as we have suggested, was part of a scheme which did not involve any other form of independent districts than those including cities, towns, or villages. Moreover, the statutory provisions on the subject, from first to last, contemplate the formation of the entire territory of a city, town, or village into one independent district; and this idea has been further carried out by recent enactment (1898) of the Twenty-Seventh General Assembly (page 51, chapter 39), requiring that, when the corporate limits of any city or town are extended outside the existing independent district or districts, the boundaries of such independent district or districts shall be also correspondingly extended.

We have, therefore, on the one hand, the history of the legislation of the state, indicating a manifest purpose to allow the formation of cities, towns, or villages into independent districts, embracing the whole of the territory of the municipality, even though the municipality includes portions of different school corporations, for there is express provision in the act of the Ninth General Assembly as to the giving of notice when the new school corporation is formed of two or more civil townships in the same or adjoining counties, and similar provisions have been in force down to the present time; and we have, on the other hand, the failure of the legislature to specify in particular words how the proceedings shall be conducted when a part of the territory to be incorporated into the new district is already included in a rural independent district, or to authorize definitely the separation from such rural independent district of a portion of its territory

for the purpose of carrying out the manifest intention of the statute. In other words, it seems that when rural independent districts were created the general language of the school law, as it existed at the time, and was subsequently reenacted with reference to the formation of the territory of cities, towns, or villages into independent districts, was not changed to correspond. Under these circumstances, we are justified in taking into consideration the general legislative purpose, and giving it effect, even though we are required thereby to extend or curtail the language used in some portions of the statute. The rule that a statute cannot be extended by construction so as to cover a *casus omissus* is recognized in the criminal law, but not in the interpretation of remedial statutes. Bishop, Statutory Crimes, sections 128, 146; Sedgwick on Construction, page 308.

2. CONSTRUCTION
of
statutes.

Since the proceedings involved in this case were commenced, the legislature has amended Code, section 2794 so as to make it directly applicable to such a case as the one now before us (29 General Assembly, page 77, chapter 126); and counsel for plaintiff contends that this legislative recognition of the necessity for an amendment in order to cover such a case is an admission that previously the statute did not cover the case. We need not, however, assume to be so ignorant of the methods of legislation as to profess not to know that a statute may be insufficient in its language to carry out the legislative intent, and that when difficulties arise in its interpretation the legislature is likely to change the language so as to make its application clear in other cases, even though the amendment could not be effective as to the case in which the difficulty has arisen. It is quite as likely that the language of the amendment was intended to make the statute correspond to what had previously been supposed or assumed to be the law as that it was thereby intended to change the general intent and purpose of the law.

3. AMENDMENT
of statute:
effect of.

Our conclusion is that to carry out the legislative intent found in Code, section 2794, reading it in the light of the history of the school legislation and contemporaneous provisions of the school law, we should consider "school township," in that section, as "school corporation," and thus find that, as originally enacted in the Code of 1897, its meaning was the same as that which is now expressly declared by act of the Twenty-Ninth General Assembly.

Counsel for plaintiff dwells at considerable length on the fact that the plaintiff independent district had been in existence for some seventeen years or more before the attempt to sever a portion of its territory was made, but we do not understand that any special sanctity is accorded to independent districts, as compared with school townships or other forms of municipal corporation. They are all subject to legislative control, and if the legislature has provided for the severance of territory from an independent district, and its incorporation into a new independent district, there is no vested right in the independent districts already existing, as against such declaration of legislative will.

The question is raised in the case as to whether an appeal to the county superintendent, and from him to the State Superintendent of Public Instruction, is not the only remedy of which plaintiff may avail itself to question the correctness of the action of the board of directors of Washington district township. On such an appeal to the county superintendent, it was held that the action of the board was erroneous, but on further appeal to the state superintendent such action was sustained. As the conclusion we reach is the same as that reached by the state superintendent, we think it not necessary in this case to discuss the question whether the remedy by appeal is exclusive, or whether the determination by the state superintendent is an adjudication binding on the courts.—**AFFIRMED.**

4. CHANGE of boundaries.

5. APPEAL: adjudication.

MYETLE BISSELL, Appellant, v. VERDIE MAY BISSELL AND
EDNA BISSELL, Appellees.

120	127
140	292
140	392

Distribution of Estate. **ADVANCEMENT: WHAT CONSTITUTES.** An

- 1 advancement is a voluntary gift made by the parent with the intent that it shall be taken into account on the settlement of his estate,

Same. In a suit for divorce by the wife, a sum treated as alimony

- 2 was placed in the hands of a trustee for the benefit of a minor child. The custody of the child was awarded the wife and the husband relieved from further liability for support of the child. *Held*, on settlement of the husband's estate the sum placed with the trustee was not an advancement to the child.

Homestead: **APPORTIONMENT OF INCUMBRANCE.** An allowance to

- 3 the widow of one-third of the real estate, including the homestead, and an apportionment of the incumbrance executed by husband and wife so as to leave the homestead free, is proper, though the widow thereby receives more than one-third the net realty.

Appeal from Madison District Court.—HON. A. W. WILKINSON, Judge.

FRIDAY, APRIL 10, 1903.

SUIT in equity for the partition of certain real estate theretofore owned by one W. G. Bissell, deceased. From the decree rendered by the trial court, both parties appeal; but as plaintiff first perfected her appeal, she will be called the "appellant."—*Affirmed*.

F. E. Nicholson and Steele & Robbins for appellant.

John A. Guiher for appellee Edna Bissell.

DEEMER, J.—W. G. Bissell died intestate in September of the year 1900 seised of six hundred acres of land. This land was incumbered by mortgage in the sum of \$11,000.

He left as his widow Myrtle Bissell, plaintiff herein, who resides upon a part of the land, defendant Verdie May Bissell, a daughter, and Edna Bissell, a daughter by a former marriage to one Elmira Bissell, from whom he was divorced in the year 1897. At the time of the institution of this suit in the year 1901, Verdie May Bissell was about one year old, and defendant Edna about ten. In April of the year 1897, Elmira, the first wife of W. G. Bissell, brought suit for divorce, and obtained a decree, which, among other things, provided: "The court finds that plaintiff is entitled to the care and custody of the minor child of the parties hereto—Edna Bissell—until she reaches the age when she may choose her guardian. And the court further finds that the defendant has provided for the support of said child by depositing with Alfred F. Bissell, to be held in trust for said child, subject to the orders of this court, the following notes. * * * And it is further ordered, considered, adjudged, and decreed that the above-described notes heretofore deposited with Alfred F. Bissell for the support of said child shall be held by said Alfred F. Bissell for said child until she reaches the age of twenty-one years, and that said trustee shall pay to the plaintiff, out of the interest and profits of said trust fund, one hundred dollars each year from and after April 1st, 1897, for the maintenance for said child, until further ordered by this court; and that said trustee may, under the directions of this court, expend such further sums or sum from the interest or principal of said trust fund as may be necessary in his judgment to properly clothe, support, and educate Edna Bissell until the termination of this trust; and, in case the said child shall live until she is twenty-one years of age, the principal and interest then in the hands of said trustee shall be paid to the said Edna Bissell; but, should the said Edna Bissell die without issue before she is twenty-one years old, then the amount of the trust fund then remaining shall thereupon revert to

or become the absolute property of plaintiff and defendant or his heirs, each receiving one-half of said remainder; and, in case the plaintiff is not living, all the said sum shall be paid to the defendant or his heirs. But should the said Edna Bissell die before reaching the age of twenty-one years, leaving issue, then said issue shall inherit the amount of the trust funds then remaining."

Plaintiff claims one-third in value of the lands left by her deceased husband, and contends that the amount awarded Edna by the decree of divorce above quoted should be treated as an advancement to her and taken into account in the partition of the property. Part of the land being homestead in character, plaintiff asked that this homestead be included in the premises assigned to her, and that the incumbrance on the property be adjusted so as to leave the homestead free; and that, of the part not homestead in character, an adjustment of the incumbrance be made so that it should bear its just proportion thereof. The trial court denied the claim of advancement, allotted to plaintiff one hundred and seventy-four acres of land, which included the homestead; decreed that she should pay \$2,852 of the incumbrance; awarded to each of the defendants something over two hundred acres of land, and found that they should each pay \$4,074 of the incumbrance. It also found that the homestead should not be charged with any portion of the incumbrance. Plaintiff appeals from that part of the decree denying the claim of advancement, and defendant Edna Bissell from that part apportioning the incumbrance against the several allotments of land.

Referring first to plaintiff's appeal, we find the law as to what constitutes an advancement to a child very well settled, and the only difficulty is in its application. An

i. ADVANCE-
MENT: what
constitutes. advancement is an irrevocable gift made by a parent to a child in anticipation of such child's future share of the parental estate. *In re Lyon's*

Estate, 70 Iowa, 375. *West v. Beck*, 95 Iowa, 520. First, then, it must be a voluntary gift, and, second, it must have been made with the intent on the part of the parent that it shall be taken into account on the settlement of the estate. But where a voluntary gift from parent to child is shown, the rule in this state is that it is presumed to be an advancement, and in the absence of evidence to the contrary it will be so treated. *Burton v. Baldwin*, 61 Iowa, 283; *Phillips v. Phillips*, 90 Iowa, 541; *McMahill v. McMahon*, 69 Iowa, 115. Money paid to or for a child for his education, maintenance, or support, or for his pleasure or travel, will not ordinarily be considered an advancement. Nor will expenses incurred in the discharge of ordinary parental duties. If the provision is made for the child's permanent good, as for starting him in business, it will be so considered in the absence of evidence to the contrary. Proper evidence of intention is always admissible, and but slight evidence is needed to overcome the presumption stated. *Middleton v. Middleton*, 81 Iowa, 151. Like all gifts, the advancement must be voluntary. If made in response to a legal demand or in discharge of a legal obligation, the doctrine of advancement does not apply. *Hart v. Chase*, 46 Conn. 207.

With these rules settled, we now go to the evidence, and find that W. G. Bissell brought action against his first wife for divorce, which he abandoned. He then induced his said wife, Elmira, to bring action against him
2. SAME. for divorce and, after some negotiations between the parties it was finally agreed that as alimony Elmira should have \$2,500 and that \$2,500 should be set off to Edna, the child, for her support and education, and as part of the alimony. At that time W. G. Bissell was worth about \$15,000. The \$2,500 thus agreed upon was placed in the hands of a trustee, as recited in the decree before quoted. Nothing was said at the time about this being an advancement to the child, and it seems to have been allowed on the

theory that it was a part of the alimony to which the wife was entitled, but placed in the hands of a trustee for the benefit of the child. The custody of the child was awarded to plaintiff in the divorce case—Elmira Bissell—and, on account of the allowance, W. G. Bissell was relieved of his legal obligation to support the child. There is testimony to the effect that W. G. Bissell declared, shortly before his death, that he had paid his daughter Edna all that he intended her to have. While such evidence may be admissible for the purpose of showing intent at the time the payment or gift is made, it will not be permitted to change the character of the transaction. In view of the circumstances under which the allowance was made, we think it would be going too far to hold that the amount awarded Edna should be treated as an advancement. Indeed, we do not think it was a gift at all.

II. As to the apportionment of the incumbrance, which amounted at the time of the trial to practically \$11,000, and which was evidenced by a mortgage signed by both W. G. Bissell and Myrtle Bissell, it is well settled that the homestead will be protected, if possible, and, to accomplish this result, secondary liability only is imposed upon it. *Mc-Glothlen v. Hite*, 55 Iowa, 392; *Wilson v. Hardesty*, 48 Iowa, 515. Moreover, in the case last cited, it is expressly held that the widow is entitled to have her distributive share so set aside to her as that it shall not be liable for incumbrances in which she has joined until the other property covered thereby is first exhausted; that her share is not to be burdened with any part of the incumbrance, unless it should be necessary to resort to it after exhausting the other mortgaged property. The referees appointed to set aside the widow's share found that the value of the land was \$30,000, and that, after deducting the incumbrance against it it was worth \$19,000. The widow was allotted one hundred and seventy-four acres of land, forty

3. HOMESTEAD:
apportion-
ment of in-
cumbrance.

acres of which was found to be homestead, and not chargeable with any part of the incumbrance, but the remainder of the land was charged as hitherto stated, and the portions assigned to defendants were each charged with the sum of \$4,074. As the homestead was only secondarily liable, and as the remainder of the land was amply sufficient to pay the incumbrance, we see no error in the decree in this respect.

That part of the decree charging the remainder of the land assigned to the plaintiff with its proportion of the mortgage incumbrance is not complained of by plaintiff or defendants, and need not be considered.

It is contended that by this apportionment the widow received more than one-third in value of the real estate of which her husband died seised. This is perhaps true, but it results from the nature of the property awarded to her. As said in *Mock v. Watson*, 41 Iowa, 241, "The interest of the wife is not, as that of the heirs, made subject to the rights of others and to charges against the estate." The case seems to be ruled by *Wilson v. Hardesty*, and other like cases. The widow did not, by executing the mortgage, relinquish her homestead rights except, in so far as might be necessary to pay the remainder of the mortgage, after exhausting the other property included therein. See, also, *In re Lund's Estate*, 107 Iowa, 264.

The decree is in all respects correct, and it is **AFFIRMED**.

W. H. SLEEPER v. J. L. MURPHY, Appellant.

Sale of Land by Agent: UNAUTHORIZED CONTRACT: RATIFICATION

- 1 Where a real estate dealer enters into a contract for the sale of land on terms other and different from those given him by his principal, the same is not binding upon the principal unless subsequently ratified.

Ratification: EVIDENCE. Where by the conduct and correspondence of the principal he ratifies the unauthorized contract for the sale of his land by his agent, the same is irrevocable. Evidence considered and held to constitute ratification.

Appeal from O'Brien District Court.—HON. WM. HUTCHINSON, Judge.

FRIDAY, APRIL 10, 1903.

ACTION in equity asking the specific performance of a contract to convey land. Judgment for the plaintiff. The defendant appeals.—*Affirmed.*

Ernest C. Herrick for appellant.

Carr, Hewitt, Parker & Wright and *Milt H. Allen* for appellee.

SHERWIN, J.—On the 23d day of May, 1900, the defendant, by letter, authorized one P. A. Edington to list lands belonging to him in O'Brien county for sale. The sales were to be made at \$40 per acre; \$1,500 to \$2,000 cash to be paid at the time the contract was made, and the balance to be in payments of \$600 each year thereafter until paid, with six per cent. interest, payable annually. The crop of that year was also to be reserved for the defendant. On the 14th day of June following, Edington sold a half section of the defendant's land to the plaintiff at \$40 per acre. Fifteen hundred dollars of the price was to be paid in cash, and the balance in eighteen payments, represented by as many notes, drawing six per cent. interest from March 1, 1901, and made payable "on or before," and due on the 1st of November of each year. A written memorandum of the sale was given by Edington in the name of the defendant. It seems hardly necessary to say that the terms of this sale were not authorized by the defendant, or binding upon him, in the absence of a ratification thereof.

1. UNAUTHORIZED contract: ratification.

Edington had no authority to postpone the interest, or to make the notes payable on or before, and he also failed to reserve the rent as required; hence the defendant was not bound by the contract at the time it was made, and, unless he afterwards ratified it, he should not be compelled to perform it.

The day after the sale was made, on the 15th of June, Edington wrote the defendant, advising him thereof, and stating to him the exact and true terms agreed upon, including the conditions as to the notes, and stating that they were so drawn because of the reservation of the 1900 rent. In that letter he asked the defendant to execute a contract for the land in the name of A. W. Sleeper, and send it on. On the 18th day of June, Edington again wrote the defendant relative to the matter; calling his attention to the reason why the interest on the notes was postponed, and urging a ratification of the sale. June 21st the defendant wrote to Edington saying: "Your letter asks me to use name of 'A. W. Sleeper' in making papers, while the copy of 'Memorandum of sale' sent me by Mr. Miller, made by yourself, uses the name of the purchaser as 'W. H. Sleeper.' Which is right and what is the reason for the discrepancy? When you send correct name of the responsible party, will write you again in a day or two." The memorandum of the sale referred to in the foregoing letter is the one given to the plaintiff, a copy of which was received by the defendant as early as the 18th of June—only a day or two after he received Edington's letter of the 15th. It conclusively appears, then, that as early, at least, as the 18th of June, the defendant was fully advised of the exact terms and conditions upon which the sale had been made. On the 28d day of June, Edington again wrote the defendant, giving him a reason for the mistake in the name, told him who the purchaser was, again urged him to send on a contract so that the sale might be closed, and advised him

2. RATIFICA-
TION: evi-
dence.

further that the plaintiff had then begun an action for specific performance of the contract. Answering that letter, the defendant wrote as follows: "Dear Sir: In replying to yours of the 23d inst., would say that I have written to the Recorder of O'Brien County to inform me as to the number of acres, according to the land records of his county, and as soon as I hear from him I will prepare a contract and send you. I do not understand why your man, Mr. Sleeper, should seek into court in such haste as I never refused to make a contract, and should I have sent you the papers in the name you directed it would have to be changed."

With a copy of the memorandum of sale and the several letters written to him by Edington, to which we have referred, before him, and without having interposed a single objection to the terms of the sale, the defendant finally answered the numerous appeals of Edington for a ratification of his acts in this last letter, and at the same time he answered the suit brought against him by the plaintiff by deliberately promising to send on a contract to close the matter. It will not do to say that he only agreed to send on such a contract as he might be pleased to make. He does not say any such thing, nor can it be implied from the language of his letter. On the other hand, when it is construed in connection with the contemporaneous correspondence, it will admit of no such interpretation. If the defendant had not intended to ratify the sale upon the precise terms agreed upon by the plaintiff and Edington, he would not have written as he did. Having ratified the sale, it is, of course fundamental that it is irrevocable.

We think the judgment of the district court right, and it is **AFFIRMED**.

120	186
125	173
120	138
136	467

120	136
144	351

J. H. LUTZ, Appellee, v. THE ANCHOR FIRE INSURANCE COMPANY, Appellant.

Insurance: VERDICT: WHEN CONCLUSIVE. Where the evidence is
1 in conflict the verdict of the jury is conclusive.

Waiver of Conditions of Policy. A provision in a policy of insurance that its conditions cannot be waived except by a writing
2 on or attached to the policy is subject to waiver by the conduct of the company tending to justify the inference that compliance therewith is not insisted upon.

Evidence: WAIVER. Evidence in the case considered and held to
3 warrant the jury in finding that the company by its acts and conduct waived the provision that if additional insurance was effected without consent of the company it would avoid the policy.

Appeal from Buchanan District Court.—HON. F. C. PLATT,
Judge.

FRIDAY, APRIL 10, 1903.

ACTION at law upon a policy of fire insurance. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Cook & Leach, Sullivan & Sullivan for appellant.

Ransier & Everett for appellee.

WEAVER, J.—On February 4, 1898, defendant issued to plaintiff a policy of insurance upon a building in the town of Fairbank, Iowa, for a term of six years. The building was destroyed by fire on the night of December 30, 1900, and this action is brought upon said policy for the loss thus sustained.

The appeal presents for our consideration the single defense that plaintiff, after the date of the policy in suit,

obtained additional insurance upon the building without defendant's written consent, and that by such act, according to the terms of the contract, the policy was avoided, and defendant was relieved from all further liability thereon. The plaintiff concedes that such a clause is contained in the policy, and that he did in fact obtain additional insurance about December 1, 1900, but avers that he notified defendant of such act, and asked consent thereto, and that defendant, instead of exercising its right to insist upon a forfeiture of the contract, waived the same, and elected to treat said insurance as continuing in force, and thereafter made demand upon plaintiff for subsequently accruing installments of premium.

I. The question presented is almost purely one of fact. Under familiar rules the judgment below cannot be reversed for want of evidence unless there is such a complete lack of support in the record as to indicate that the verdict of the jury is the result of passion or prejudice. Where there is a direct conflict between witnesses concerning a material fact it is not for us to determine the question of their comparative credibility. That is the province of the jury alone, and we are not authorized to disturb the finding simply because our minds are inclined to the opposite conclusion. These remarks are more than ordinarily pertinent to a record such as we have before us. There is an irreconcilable conflict in the testimony, and the finding of the jury as to the truth of the disputed matter is decisive of the merits of the litigation.

Plaintiff and the witness Agnew, who was formerly defendant's agent at Fairbank, unite in testifying that on the 12th of December, 1900, the policy, with a letter giving notice of the additional insurance, and asking consent thereto, was inclosed in an envelope, and mailed to defendant at Des Moines, and that the policy was retained by defendant, without responding to the letter or request,

I. VERDICT:
when con-
clusive.

until after the fire. On the other hand, defendant's witnesses say that the package was not received at Des Moines until December 31st, and was contained in an envelope postmarked at Fairbank on that day. The alleged envelope was produced in court, but plaintiff and his witnesses both assert that it is not the one in which said policy was sent but, is the envelope in which notice of loss was sent to defendant on the day after the fire, a notice receipt of which is denied by defendant. Now, as the question of the defendant's alleged waiver turns to a very great extent upon the fact as to the time when the notice of additional insurance was received, the determination of the conflict between these witnesses is of prime importance. The policy provided that the taking of additional insurance would render such policy void unless written consent was indorsed thereon, and that no person acting as agent, employe, or other person than the secretary or assistant secretary of the defendant could in any way or manner waive any condition of the contract, and that such waiver must be in writing on or attached to the policy. It is also true that no such express written waiver was made, or was ever indorsed upon or attached to such policy. Defendant had the undoubted right, if it so desired, to insist upon the strict letter of its contract, and treat the policy as avoided from the moment the additional insurance was procured. On the other hand, it was not within the realm of legal possibilities that it should divest itself of all capacity to waive any contract right it possessed, or should so limit the manner and form in which a waiver may be expressed that such limitation itself might not be waived. This, we think, is substantially the holding of the court in *Ruthven v. American Fire Insurance Co.*, 102 Iowa, 550. If, then, we assume, as the jury evidently found that notice of the additional insurance was given and request for written consent thereto made on December 12, and thereafter defendant continued to

2. WAIVER of
conditions
of policy.

treat the policy as in force, and give the plaintiff reasonable ground to believe that it did not intend to insist upon the strict terms of the contract in this respect, then the question of a waiver became a proper one to submit to the jury.

It appears without dispute that the premium on the policy had been paid from year to year and that at the time of the alleged notice of additional insurance, no part
3. EVIDENCE: of such premium was past due. On the 28th
waiver. of December 1900,—sixteen days after the alleged notice—defendant notified plaintiff that the next installment of premium would fall due on January 28, 1901, and requested prompt payment to prevent the suspension or avoidance of the policy. On January 29, 1901, after the fire, defendant notified plaintiff of the maturity of the installment, saying to him that if not paid within thirty days, his policy would be suspended. Both of these notices were subscribed by the secretary of the company, the officer named as having power to waive conditions of the contract. On April 9, 1901, defendant, by its attorney, made further demand of plaintiff, and informed him that, if the premium was paid within ten days, the policy would be reinstated. It seems very clear that, if defendant was made aware of the act avoiding the policy on or about the 12th of December, and proposed to insist upon the letter of its contract, it should have acted consistently with that purpose. It could not treat the policy as void for the purpose of defense to an action to recover for a loss thereafter occurring, and at the same time treat it as valid for the purpose of earning and collecting further premiums. Having received the notice, it was within its power to ignore the failure of plaintiff to observe the precise terms of the policy, and to continue to treat the contract of insurance as still of binding force and effect. *Bloom v. Insurance Co.*, 94 Iowa, 359. Whether it did so was a material question of fact, upon both sides of which there was competent testimony, and it was properly submitted as

such in the instructions given by the trial court. No objection is made to the court's charge, save in a general way that "each and all" of the paragraphs are erroneous. This is insufficient to raise any question for our consideration.

We find no reversible error in the record, and the judgment below is **AFFIRMED**.

DANIEL AND GUY LEONARD, Appellants, v. A. B. WAKEMAN
et al., Appellees.

Counties: REPAIR OF BRIDGES: MANDAMUS. Under Code, section 422, mandamus will not lie to compel a board of supervisors to make repairs to county bridges, where, in the exercise of their discretionary power, they have refused so to do.

Appeal from Taylor District Court.—HON. R. L. PARRISH,
Judge.

FRIDAY, APRIL 10, 1903.

PLAINTIFFS are residents of Holt township, Taylor county, this state, and the defendants are the members of the board of supervisors of said county. In their petition plaintiffs allege that a county bridge, located in said township, and forming a part of a public highway in said township, has become and is now out of repair, defective and unsafe; that defendants, as such board members, have personal knowledge of the impaired condition of said bridge, and have been notified thereof, and repairs thereon demanded; that said board, in violation of the legal duty enjoined upon it by law, has refused, and still refuses, to make such repairs; that plaintiffs have a special and personal interest in said highway bridge independent and separate from the interest of the general public, in that they are prevented, by reason of the present condition thereof, from going from their respective homesteads over

to and upon other lands owned by them. The prayer is that defendants may be compelled by mandamus to put said bridge in a state of repair suitable for public travel. To the petition the defendants filed a demurrer, in which it is asserted that the facts stated do not warrant the relief demanded, in that (1) plaintiffs seek to compel by mandamus the performance of a discretionary act, and to control that discretion; (2) plaintiffs seek to compel by mandamus the exercise by the board of its judicial and discretionary power, alleging at the same time that such power has been exercised by its refusal to make the repairs demanded. This demurrer was sustained, and plaintiffs appeal.—*Affirmed.*

Arthaud & Arthaud and *T. L. Maxwell* for appellants.

Wm. E. Miller for appellees.

BISHOP, C. J.—There is but one question presented by this record: Does the law make it the duty of the board of supervisors to repair county bridges, in the sense that an action for mandamus will lie in the event of failure and refusal? Section 422 of the Code provides that the board of supervisors at any regular meeting shall have the following powers: “(18) To provide for the erection of all bridges which may be necessary, and which the public convenience may require * * * and to keep the same in repair.” By section 4341 of the Code it is provided that the action for mandamus will lie to compel a board, etc., to do an act, the performance of which the law enjoins as a duty resulting from an office, etc. Where discretion is left to the board, mandamus can only compel it to act, but cannot control such discretion. Such are the only provisions of the statute having direct bearing upon the question we have before us. Counsel for appellants concede that in the matter of the erection of bridges the power is wholly discretionary, and that, accordingly, no action will

lie to compel the exercise thereof. But they contend that when once a county bridge has been erected and dedicated to the public use, it becomes the legal duty of the board to keep the same in repair, and this duty may be enforced by a resort to the action for mandamus. The reading of the statute does not bear out this contention. The power is given to build and the power is given to repair, and such is neither greater nor less in the one instance than in the other. In such a case power to act is simply the right to act, and, there being no words in the statute to indicate a contrary intent, it must be held that it is not within the province of the courts to determine when or how the power shall be exercised. Discretion is a necessary incident to the exercise of such a grant of power; and especially where, as in this case, the discretion has been exercised, and the board has refused to make an appropriation for the purposes of repair, we think such refusal must be accepted as conclusive. This is in direct line with the holding in *State v. Morris*, 43 Iowa, 192, where it is said: 'If no bridge had ever been erected at the point in question, it would scarcely be claimed that at the suit of a private individual the board could be compelled to construct one. The case at bar is not different in principle from the one supposed. The bridge has fallen down so that the road is impassable until a new bridge is erected. The board of supervisors have acted upon the matter, and have refused to make any appropriation for the rebuilding of the bridge. They have exercised the discretion with which the law invests them, and this discretion it is not competent for the courts, through the writ of mandamus, to control. It would be a novelty if, after the board of supervisors have determined that the public interests do not require the erection of a bridge, the district court should upon the application of a private individual overrule that decision.' See, also, *Denison v. Watts*, 97 Iowa, 633

In support of their contention, counsel for appellants cite a line of cases commencing with *Wilson & Gustin v. Jefferson County*, 13 Iowa, 181, wherein the doctrine is announced that a county may be held liable for injuries, resulting in damage, caused either by defective construction of bridges, involving negligence, or negligence in failing to keep the same in repair. The authority of these cases is not to be doubted, but the principle involved has no application here. In its broadest signification the rule of the cases cited is authority only for the proposition that the county may be held liable for specific damages proven, if its governing board shall be negligent in connection with the matter of building a bridge, or, having elected not to rebuild or repair a certain bridge, if it shall be negligent in not taking necessary precaution to warn and protect innocent and unwary travelers from a dangerous condition left existing in connection therewith. The duty enjoined is that general duty which the law places upon the shoulders of every one that he use instrumentalities in his charge, or under his control, so that the same shall not become a menace to the lives and property of others. Manifestly, such rule has no relation to the doctrine announced in *State v. Morris*, *supra*. The essence of the holding in that case is that in the matter of building and repairing bridges, the duty devolving upon county boards is a discretionary one; that it is a duty which it owes to the public generally, and not to an individual, or any class of individuals, and that the exercise thereof cannot, therefore, be controlled by a resort to the courts. We conclude that there was no error in the ruling upon the demurrer.

—AFFIRMED.

IN THE MATTER OF THE GUARDIANSHIP OF LEWIS L. GRAY, a
Minor, S. B. BARNES, Guardian.

Guardian and Ward: ACCOUNTING. C, as guardian of a minor, received \$787.07, and thereafter was removed and defendant appointed, who was C's general attorney and who admitted shortly before C's death that he held \$980 of the minor's money. As attorney for C, defendant was entitled to charge five per cent. on moneys collected and disbursed by him, and after C's death defendant rendered an account as such attorney, which showed a balance of \$203.74, which amount being insufficient to pay his commissions, defendant credited himself with \$980.00 paid the minor's estate as returned, and from the balance deducted \$900 commissions, and paid C's executor the balance. On an accounting of his acts as guardian, defendant was properly required to pay over the funds of his ward, although he claimed to be unable to find where the same had been invested by C.

Appeal from Mills District Court.—HON. A. B. THORNELL,
Judge.

FRIDAY, APRIL 10, 1903.

THIS is an appeal by S. B. Barnes, guardian of Lewis L. Gray, a minor, from the judgment of the district court made and entered upon hearing of final report filed by said guardian. The opinion sufficiently states the facts.—*Affirmed.*

A. E. Cook and W. S. Lewis for appellant.

E. B. Woodruff for appellee.

BISHOP, C. J.—It appears that prior to September 26, 1895, one W. M. Coats had been appointed and qualified as guardian of said minor, Lewis L. Gray. On the date mentioned, Coats received cash belonging to said minor in the sum of \$725, and on October 16th following the further

sum of \$62.07. In the early part of the year 1899 the said Coats was removed as guardian, and S. B. Barnes was appointed and qualified in his stead. In November, 1900, Coats died, and W. W. Micklewait was appointed and qualified as executor of his estate. The abstract is somewhat confusing as to the facts, but therefrom we gather that in December, 1900, the said Barnes filed his final report—his ward having in the meantime reached the age of majority—in which he refers to the amounts of money coming into the hands of his predecessor, Coats, but says he has been unable to find where such funds have been invested. We are left to infer that it is asserted in the report that no property in fact ever came to his hands, that there is no probability that anything will ever be realized out of the Coats' estate, and that accordingly the guardian is asking for his discharge. To such final report the said Lewis L. Gray filed written objections, in which it is asserted that the moneys collected by Coats were afterwards received by Barnes, and that he (said Barnes) now has about \$950, which he retains and refuses to pay over. The executor of the estate of Coats and the sureties on the guardianship bond of Coats appear and join with Gray in making such objection.

It appears that in March, 1899, Coats, who was about to go away from his home, gave to Barnes a general power of attorney, authorizing him to take possession of and transact all business in which said Coats was interested. Barnes proceeded to execute such power, and in December, 1900, after the death of Coats, he rendered to Micklewait, executor, an account of his doings as such attorney in fact, from which it appears that on October 14, 1899, among other disbursements, he charged to Coats an item of \$980 on account of the Coats guardianship of L. L. Gray. By letters of date August 15, 1900, and September 13, 1900, Barnes admitted that the Gray money was in his

hands, in the sum of \$980. He also testifies as a witness in this proceeding that he had in fact paid to himself as guardian said sum of money out of the funds in his hands belonging to Coats. It seems that in making his final accounting to Micklewait, executor, he claimed that by virtue of an agreement with Coats he was entitled to charge for his services the sum of five per cent on all moneys collected and disbursed by him. The amount shown to have been collected in that behalf was \$18,016.37, and the disbursements, not including compensation, \$17,812.63; leaving a balance of \$203.74. Such being the state of the account, a settlement was attempted to be made by Barnes with the executor. Therein he proceeded to give himself credit for the sum of \$980, "money paid Gray estate returned"; thus making the balance in his hands \$1,183.74, from which sum he then deducted the amount of the compensation claimed by him, being \$900.81, and thereupon turned over the balance, or \$282.93, to Micklewait executor.

One of the grounds upon which Barnes, in his testimony, now attempts to justify his course as above referred to, is that the moneys paid over to himself as guardian, as shown in his account, and as reported by him, in point of fact belonging to another estate, of which Coats was the legal representative, and should not, therefore, have been credited to the matter of the Gray guardianship. It is sufficient answer to this contention to say, without going into details, that it appears from his own testimony that the amount due from Coats to such other estate was fully settled by him (Barnes) from other funds in his hands under an order and approval of court. Another ground of excuse, which comes to the surface for the first time in his testimony, is that he had learned in some way that the Gray moneys had been invested—just how, it is not clear—in an equity in some lands, and that the same could not be realized upon because of the sale or appropriation of

such lands under a prior claim or lien. This excuse is not only shadowy in the extreme, but it is in direct contradiction to all his former statements. The court below evidently took the view, in which we concur, that Barnes, surprised at finding the final balance in his hands belonging to the Coats estate insufficient to pay his claimed compensation, concluded to readjust the account so as to pay himself in full at the expense of Gray, his ward. That such conduct cannot be approved must be apparent.

The court below, by its judgment, ordered payment to Gray by Barnes of the sum shown to have been received by him, with interest, less the sum paid to Micklewait, executor, which latter sum is ordered paid to Gray by said executor. Such judgment meets our approval, and it is **AFFIRMED.**

120	147
1134	277

WILLIAM HAMILTON, Appellee, v. MENDOTA COAL & MINING COMPANY, Appellant.

Master and Servant: DECLARATIONS OF PRESENT PAIN. In a personal injury action, declarations of plaintiff regarding present pain are competent.

Entries to Mines: CUSTOM. Evidence as to custom of height and width of entries to mines in the same district is admissible.

Objection to Evidence: CARE: EXPERT TESTIMONY. An objection that evidence is incompetent because "measuring degrees of care" will not support a contention that the matter inquired about was not a subject of expert testimony.

Same. In an action for a personal injury in a coal mine entrance, a witness was asked "Can you, from your experience, find out all about your entry in one or two trips"? An objection that the same does not call for a custom or use does not go to its competency as expert testimony.

Negligence: INSTRUCTION. An instruction that defendant, as a matter of law, was required to keep the entry to its mine of uniform height and width, was properly refused, as any question of negligence in failing to furnish plaintiff a safe place to work was for the jury.

Conflict in Evidence: REMARKS OF COUNSEL: INSTRUCTIONS REGARDING. An instruction which assumes that certain evidence is undisputed, when in fact there is a conflict, or one directing the jury to disregard statements of counsel made in argument where it appears they were made in response to opposing counsel, should be denied.

Negligence: EVIDENCE: INSTRUCTION. Where the plaintiff was injured while at work in an entry to a mine, by a rock projecting from the ceiling of the passage, the court cannot say as a matter of law that the injury was the result of his negligence, but it is a case for the jury to determine from all the circumstances.

Appeal from Appanoose District Court.—HON. M. A. ROBERTS, Judge.

FRIDAY, APRIL 10, 1903.

ACTION at law to recover damages for personal injuries received by plaintiff while acting as a driver in defendant's coal mine. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

W. E. Blake and *F. S. Payne* for appellant.

C. F. Howell and *C. H. Elgin* for appellee.

DEEMER, J.—Plaintiff, while in the employ of the defendant as a driver of mules in an entry of defendant's coal mine, received the injuries of which he complains, while riding on a car in the mine, in coming in contact with the roof or side of the entry. The negligence charged is that the entry was not of sufficient height, in that it was but three feet and five inches high, while it should have been at least five feet, and was not properly "brushed," in that a rock from the top and north side of said entry projected to a point within three feet of the center of the track laid therein on which the cars ran, while on the other side the distance was something over five feet—in other words, that the projecting rock hung over the track from

the right rib of the coal from the roof of the said entry for the space of about three feet, whereas it should have been at least six feet above the track; that the roof should have been uniform, and as high on one side of the track as on the other, according to the prevailing custom in the coal district of Appanoose county. In brief, the charge is that there was a rock hanging down from the roof on one side of the entry which was but three feet from the track on which the cars ran, while on the other side the roof was fully five feet high. While sitting on a coal car which was being hauled through the entry by a mule which plaintiff was driving, the plaintiff came in contact with this rock, and received the injuries of which he complains. The accident occurred while plaintiff was making his second trip through the entry. He was an experienced driver, and had worked for years in coal mines.

Several errors are assigned as to rulings on evidence, and in the giving and the refusal to give certain instructions asked by the defendant. Some other alleged errors occurring during the trial will also be considered.

First, then, as to the rulings on evidence: We shall not mention all, as twenty or more are assigned, some of which involve questions which have long been regarded as settled.

Witnesses were permitted to testify as to declarations of plaintiff tending to show present pain and suffering. This evidence was clearly competent.

Other witnesses were permitted to testify to the custom in that particular mining district as to the height and width of entries. It was what is known as a "low coal district," and such testimony was admissible. *Cushman v. Fuel Co.*, 116 Iowa, 618; *Taylor v. Star Coal Co.*, 110 Iowa, 47; *Forbes v. Boone Valley Co.*, 118 Iowa, 101.

1. DECLARATIONS of present pain.

2. ENTRIES to mines: custom.

This excerpt from the record will show the next ruling complained of: "What do you say, as a man of experience in mining matters, whether it would be improper practice, in an ordinary entry, to sit on a thin slab of coal placed on the corner of a box—sit on that slab with his feet on the tail chain, his body inclined forward? What do you say as to whether that would be a proper method for a driver. (Defendant objects to this as incompetent, measuring degrees of care. Overruled. Exception.) A. It would be a proper place to sit, providing the car was not built too high." The statement of fact contained in the question correctly stated the position which plaintiff said he was in when he received his injuries. The contention now made is that the question called for a matter which was not the subject of expert testimony, and that it usurped the functions of the jury. While the objection of incompetency calls in question the admissibility of the evidence offered, yet, when to that objection a specific reason is given, the court is justified in relying on the reason assigned in making its ruling. The objection in question was, in effect, that the testimony was not competent, because measuring degrees of care. Such an objection does not furnish support for the argument now made against the admissibility of the offered evidence. Moreover, the ruling, even if erroneous, was without prejudice, because of the nature of the answer given. This answer amounted to nothing, for the witness made it depend upon the height of the car, which he did not pretend to state, and the jury certainly gained no light therefrom. The witness thereafter, without objection, proceeded to state his opinion as applied to the facts; and counsel cannot, in view of this record, rely upon the alleged error. Moreover, appellant entered upon the same field of inquiry, and cannot be heard to complain. *Ware Co. v. Anderson*, 107 Iowa, 231, and authorities cited.

3. OBJECTION
to evidence;
care: expert
testimony.

This witness was asked on re-examination the following: "Can you, from your experience, find out all about your entry in one or two trips?" Defendant objected to this as not a matter of custom and use, and
4. SAME. moved to strike it out. This was overruled, and witness answered, "No, sir." The argument proceeds on the theory that this was not a matter of expert testimony, and that the witness was substituting himself for the jury. Manifestly, no such point was made in the trial court. The objection that it was not a matter of custom and usage does not raise any such point. Moreover, the cross-examination was such as to justify the court in permitting the question to be answered.

These are all the rulings on evidence which we deem it necessary to consider.

II. Defendant asked something like ten instructions, which were each and all refused by the court. It also complains of three instructions given by the trial court on its own motion. In some of the instructions
5. NEGLIGENCE: instructions. asked, the court was requested to state, as a matter of law, that defendant was not required to keep its entry of uniform width and height for its entire distance. This was refused, and rightly so, because the matter of negligence of the defendant in failing to furnish plaintiff a safe place to work was one of fact for the jury, under proper instruction relating to the degree of care required of it. These general instructions were given, and the matter was properly submitted to the jury. Instructions were also asked regarding the degree of care required of plaintiff. In so far as correct, they were embodied in the charge as given.

Complaint is made of the court's refusal to give an instruction to the effect that no custom as to the height of entries had been established in the case. This complaint is clearly without merit, for a great deal of evidence was introduced on this proposition by both parties.

This instruction was also asked and refused: "(8) It is the undisputed evidence of all the witnesses who testified on the subject that the mule driver must be on the lookout for dangers, and should keep his body at least as low as the mule, in order to safely pass low places. If you believe plaintiff could, by keeping himself in line with his mule, and his body as low as the top of his mule—he would have avoided the accident which caused his injuries—then his failure to do so would be negligence on his part, and your verdict will be for the defendant." This instruction was properly refused, because it assumes that certain evidence was undisputed, whereas there was a conflict therein. Moreover, such an instruction, were it based on a correct hypothesis, would have tended to mislead the jury, for the reason that the jury was authorized to find that at the point in question the ground between the ties of the track had been dug out to a depth of from ten inches to one foot without plaintiff's knowledge, which, of course, would lower the mule, and allow him to pass through without in any manner affecting the car. He might have kept his head on a level below that of the mule at other places, and yet have been struck by the protruding rock which caused the injury.

Refusal to give an instruction directing the jury to disregard certain statements said to have been made by appellant's counsel in argument is complained of. There is no proper record showing that statements were made which would have justified such an instruction. In so far as we have any record, it appears that whatever remarks were made were in response to statements made in argument by defendant's counsel.

III. An instruction given by the court with reference to the effect to be given evidence regarding a custom prevailing in the district as to the height of the entries, and the manner of constructing them, is complained of.

6. CONFLICT
in evidence;
remarks of
counsel: in-
structions
regarding.

The instruction need not be set out, as it embodied correct rules of law, as heretofore announced by this court. See cases heretofore cited in the first division of this opinion, and also *Couch v. Watson Co.*, 46 Iowa, 17; *Spaulding v. R. Co.*, 98 Iowa, 212, and cases cited.

Another instruction is said to be erroneous because it assumes a state of facts which were in dispute to be true. There is no merit in the complaint, for there was no such assumption.

The last instruction related to damages for future pain and suffering. It is sustained by the following among other cases: *Bailey v. Centerville*, 108 Iowa, 28; *Kendall v. City of Albia*, 73 Iowa, 246. There was evidence as to future pain and suffering.

IV. In the motion for a new trial, complaint is made of misconduct of counsel in argument. We have already covered this point in another part of the opinion, and need not consider the matter here.

Lastly, it is argued that the verdict is contrary to the instruction and unsupported by the evidence. We shall not set out the evidence in full. There was a conflict as to

7. NEGLIGENCE: evidence; instructions.

most of the material issues. The principal point relied upon by appellant is that, as the mule went through in safety, plaintiff, had he been observant of his surroundings might, also have gone through. It should be remembered in this connection that plaintiff had other duties to perform than to keep a watch on the roof of the mine. He had a right to assume that his master had done his duty, and that he would not be exposed to unusual hazards. He was required at the point in question, because of the nature of the track, to keep a close watch of his cars, to see that they did not become uncoupled, or that any other accident should happen to them. He had been in the mine but a few hours, and, while he had theretofore passed the place three times, his attention was not called to the protruding rock. Indeed,

he was told by the pit boss before going into the entry that it was about the same height all the way through. The earth between the rails at this point was dug out so the mule could pass through under the rock without striking it. This the plaintiff did not know. We are not justified, under circumstances, in saying, as a matter of law, that he should have seen and avoided the rock. The case seems to have been for a jury, and we are not disposed to interfere with the verdict. Our conclusions find support in *Blazenic v. Ia. & Wis. Coal Co.*, 102 Iowa, 708; *Corson v. Coal Hill Co.*, 101 Iowa, 228; *Mosgrove v. Zimbleman*, 110 Iowa, 171.

Appellant's motion to strike appellee's abstract is overruled.

There is no reversible error, and the judgment is **AFFIRMED.**

THE STATE OF IOWA V. D. D. DONAHUE, Appellant.

Intoxicating Liquors: PLACE OF SALE: INDICTMENT. In a prosecution for maintaining a place for the illegal sale of liquor, it is not necessary that the indictment negative defendant's right to sell or specify the violations of the law.

Sale of Liquor. SINGLE ROOM. Code, section 2448, which provides that selling or keeping for sale of intoxicating liquors shall be carried on in a single room, does not prohibit an opening into a refrigerator room which cannot be used either as an exit or place for buying or drinking liquor.

Appeal from Jones District Court.—HON. H. M. REMLEY, Judge.

SATURDAY, APRIL 11, 1903.

CONVICTION on indictment for illegal sale of liquor. Defendant appeals.—*Reversed.*

120	154
120	467
120	154
127	346

120	154
133	417

120	154
144	386

Welch & Welch for appellant.

Chas. W. Mullan, Attorney General, and *Chas. A. Van Vleck*, Assistant Attorney General, for the State.

McCLAIN, J.—It is not necessary, in an indictment for maintaining a place for the illegal sale of intoxicating liquor, to negative defendant's right to sell under the mulct law, nor to specify in what respect the mulct law has been violated by defendant in conducting his saloon. Code, section 2424. *Ritchie v. Zalesky*, 98 Iowa, 589; *State v. Van Vliet*, 92 Iowa, 476; *State v. Pressman*, 103 Iowa, 452; *Bartel v. Hobson*, 107 Iowa, 647. It is for the defendant in the first instance to introduce evidence of compliance with the conditions of the law. It was admitted by the prosecution that defendant was authorized to conduct a saloon under the provisions of the mulct law. Defendant sought to show a compliance with these provisions as to the method of conducting his saloon. There was evidence tending to show that he violated these conditions by selling to a person who was a drunkard. See Code, section 2448, paragraph 10. This question was properly submitted to the jury.

But the court also submitted the question whether defendant had violated the conditions of the law by having, as a part of his saloon, an inner room, connected with the main room by a door other than the one used for entrance or exit from or to the public street. Section 2448, paragraph 4. On this point the evidence was clear and without conflict that in one corner of the room used as a saloon had been constructed what is called by the witnesses a refrigerating or cooling room, or ice box, the top of it below the ceiling of the main room, and the interior of it about nine by sixteen feet in size, less than six feet in height and connected with the main room by a door large enough to admit of a person entering

1. PLACE of
sale: indict-
ment.

2. SALE of
liquor: single
room.

by stooping. This room had no windows nor ventilation, and was lined with zinc. In it, partitioned from the balance of the room by slats, was a rack in which ice was kept; this rack communicating with the outside by an opening about two feet square, through which blocks of ice were shoved into the rack when it was filled. Aside from this opening for the admission of ice and the door into the main room, neither the refrigerating room itself nor the rack had any connection with the outside. The room was used as a place for storing kegs of beer, being large enough, as one witness thought, to accommodate a carload of kegs. The kegs from which beer was being drawn for sale were also kept in this room, being connected with faucets from which the beer was drawn out back of the bar in the main room. In short, this so-called refrigerating or cooling room was simply a large ice box for the purpose of keeping beer cool while stored awaiting sale, and it was incapable of use for any other purpose.

The language of the Code describing the conditions imposed on those who are allowed by the mulct law to carry on the business of selling liquor, so far as having any possible application to this phase of the case, is as follows: "Said selling or keeping for sale of intoxicating liquor shall be carried on in a single room, having but one entrance or exit, and that opening upon a public street. The bar where liquors are furnished shall be in plain view from the street, unobstructed by screens, blinds, painted windows or any other device. There shall be no chairs, benches, nor any other furniture in front of the bar, and only such behind the bar as is necessary for the attendants." Code, section 2448, paragraph 4. Two objects seem to have been within the view of the legislature in using this language: First, to have all portions of the room used by those buying or drinking intoxicating liquors in the place open and visible; and, second, to prevent the maintenance of any exit from or entrance to the room

other than through one main opening to the public street. We have held that a second entrance or exit is prohibited although it may be in fact used only by the proprietor and his employes. *State v. Gifford*, 111 Iowa, 648. We have also held that a second door, opening into an office through which one could pass from the main room to the street otherwise than through the principal entrance is prohibited. *Ritchie v. Zalesky*, 98 Iowa, 589. In this last case some reference is made to a refrigerating room, but it was not directly held that the opening for entrance and exit, connecting that room with the saloon, was a violation of the statute. We have also held that a door for entrance from and exit to a room or shed in which liquors were stored was a violation of the statute (*State v. Bussamus*, 108 Iowa, 11); and, further, that a door connecting the main room with a store room, in which were kept articles to be used for lunches, was a violation. *Garrett v. Bishop*, 113 Iowa, 23.

In none of these cases has it been decided that to maintain, in connection with the main room, a refrigerating room, which by reason of its construction could not be used for any other purpose, was a violation of the statute. It is to be noticed that the language of the statute does not refer to a door, but to an entrance or exit, and while it may be conceded that, if the entrance or exit is to another room, to which persons might resort for the purpose of buying or drinking liquor, there is a clear violation of the statute, even though there is not an outside door to such other room through which people may come and go, nevertheless we think that an opening into a refrigerating room, which cannot be used either as a passage way or as a place for buying or drinking liquor, is not prohibited. The same reasoning is applicable to the statutory language relating to publicity. It is no doubt intended that there shall be no place where persons can be screened from the view of others in the room while buying or drinking liquor.

But the court went further in its instructions, and said: "The intention of the law is that there shall be no place about the saloon where any one can be concealed from full view of those who may be in the saloon or in front of the same." This statement is too broad as to the intention to be drawn from the language of the statute. The object seems not to be specifically to prevent a person from concealing himself, which he might do in an empty barrel or in a wood box, but from being enabled to buy or drink liquor while concealed. As the undisputed evidence shows that the cooling room could not be used by one buying or drinking liquor, it was improper to give an instruction to the effect that, if it might be used otherwise for the purpose of temporary concealment, it was a violation of the statutory provision. As this room was not objectionable on that account, nor as a means for entrance to or exit from the main room to the outside, the real purpose of the statute was not in any way violated, and in this respect there was no question for the jury.

We do not overlook the fact that the statute requires the selling or keeping for sale to be carried on in a single room. But this language should have a reasonable interpretation in determining what is a single room. In the case before us it appears that the so-called cooling room was constructed inside of the single room occupied by the defendant in carrying on his business. It was not, therefore, another room, but simply an appurtenance or adjunct within such room. The liberal construction which we are required to give to the statutes relating to the suppression of the illegal sale of intoxicating liquor does not make it necessary that we wholly ignore the manifest intention and purpose of the legislature in using the language employed, and give it a technical construction contrary to such intention and purpose. We think that defendant was carrying on the business of selling and keeping for sale intoxicating liquors "in a single room."

The action of the lower court in submitting to the jury the question of whether, as to the nature of the place where defendant's business was carried on, there was a failure to comply with the statutory conditions, was erroneous, and a new trial is granted.—REVERSED.

**E. H. WARNER V. THE CHICAGO & NORTH WESTERN RAILWAY
COMPANY, Appellant.**

120 159
127 534

Water Course: UNLAWFUL DIVERSION. The fact that water was standing on plaintiff's land at the time of the wrongful diversion of other water by defendant onto his land would not necessarily defeat plaintiff's recovery.

Appeal from Tama District Court.—HON. OBED CASWELL,
Judge.

SATURDAY, APRIL 11, 1903.

ACTION to recover damages for the overflow of land. Trial to a jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

Hubbard, Danley & Wheeler for appellant.

Caldwell & Walters for appellee.

SHERWIN, J.—The testimony shows that the water flowing down Jackson creek was diverted on to the plaintiff's land by reason of the insufficient passageway therefor through the defendant's roadway, and on account of a ditch running east on its right of way. The plaintiff was entitled to such damages only as he could prove were caused by this overflow of his land, and, if the water diverted from Jackson creek on to his land commingled with water which had reached there from some other source, it was for him to prove the damage caused by the water from the

creek. The fact that water from the hills north of his land flowed thereon, or that some was already standing on the land at the time of the overflow of the creek, would not necessarily defeat a recovery, for the testimony tends to show that this natural flow of water had never seriously interfered with the cultivation of the plaintiff's land, and had never destroyed the grass, or prevented a fair crop thereon. If the jury believed such to be the case, it was justified in finding that the additional volume of water thrown on to the land from the creek was the cause of its condition later in the season. It is also a matter of common observation that a large volume of water standing upon land will more thoroughly saturate it than a small amount. The instructions complained of seem to us to announce correct principles of law, and to be in harmony with the decisions. As we have already said there was testimony before the jury upon which the instructions were based, and we think they were properly given; and, in our judgment those given, sufficiently covered the instructions asked by the defendant, and there was, therefore, no error in refusing to give those asked.

The single question to the witness Youngerman on cross-examination was not of great importance one way or the other. He might properly have been permitted to answer it, but we will not reverse because of the ruling.

The judgment is **AFFIRMED**.

WRIGHT & HUBBARD, Appellees, v. THE FIRST NATIONAL BANK OF SIOUX CITY, IOWA, Appellant, AND F. J. STONE, Appellee.

Attorney's Fees: SEPARATE LIABILITY OF DEFENDANTS: EVIDENCE. Plaintiff's claim for attorney fees was admitted by defendants and the issue was between the defendant bank and Stone, its president, as to liability therefor, which was submitted to the court on stipulation. The principal portion of the claim

in dispute related to negotiations which culminated in a contract that brought about a complete settlement of the affairs of the bank, and which could not be carried out except by its consent, and while Stone chiefly conducted the negotiations, yet the finding of the trial court that the services were rendered for the bank, had sufficient support in the evidence, and the release of Stone from liability was therefore not error.

Appeal from Woodbury District Court.—HON. F. R. GAY-
NOR, Judge.

SATURDAY, APRIL 11, 1908.

ACTION at law to recover upon a claim for attorney's fees. From a judgment in favor of plaintiffs for the principal part of their demand against the defendant bank, the latter appeals.—*Affirmed.*

Lewis & Lewis for appellant.

Wright, Call & Hubbard for appellees Wright & Hubbard.

Taylor & Burgess for appellee Stone.

WEAVER, J.—Plaintiffs claim upon an account, consisting of numerous items, aggregating \$1,105.10 and interest thereon, for services alleged to have been rendered for the defendants. The bank, answering separately, first, denies the claim generally; second, admits its liability to pay certain specified items, amounting to \$36; and as to other specified items avers the services therein mentioned were rendered to Stone alone, and not to the bank. By way of counterclaim the bank sets up the promissory note of plaintiffs for \$1,000 and interest, upon which it asks judgment. The defendant Stone, answering for himself, denies plaintiffs' petition and each and every allegation therein contained. By agreement of parties the cause was tried to the court without a jury, with stipulation author-

izing the court to find what portion of plaintiffs' claim should be paid by the bank and what by the defendant Stone, and render judgment accordingly. No dispute is made that plaintiffs performed the services charged for, or that such services are of the value alleged; but the real controversy turns upon the question whether certain items of the claim are chargeable to the bank or to Stone. The controversy centers particularly about an item of \$500 charged for consultations had and negotiations conducted concerning matters hereinafter mentioned. Some of the smaller items, it is admitted in argument, are properly chargeable to Stone, and not to the bank. The evidence tends to show that in the year 1896 the First National Bank of Sioux City became financially embarrassed and was placed in charge of a receiver. Soon afterwards a reorganization was effected and the bank resumed business. The reorganized bank did not prosper, and efforts were made to secure the aid of some party who would furnish the money necessary to protect the bank's depositors, and thus obtain time in which to realize upon the slow assets and avoid the sacrifice to be apprehended from a forced liquidation. T. J. Stone was president of the bank, and owner of a majority of its capital stock, and naturally was a principal figure in these negotiations. After frequent and protracted consultations the negotiations ended in a contract upon which much of this controversy hinges. The only parties named in the contract and executing same are T. J. Stone and the Farmers' Loan & Trust Company.

By the terms of this agreement, which is much too voluminous to set out in full, Stone assigned all his shares of the bank stock to the company. The agreement also provided in elaborate terms for the settlement of the business of the bank, the preservation of its assets, and the payment of its liabilities. The testimony tends to show that this scheme of relieving the bank from the necessity of again going into the hands of a receiver was entered

into with the consent and approval of the bank's board of directors, and that the plan of settlement thus adopted was carried out. During all these negotiations the plaintiffs' firm of attorneys was consulted by the president and cashier, as well as by other members of the directory, and on one or more occasions one of the plaintiffs attended a meeting of the board, giving advice and help in bringing about the adjustment. The trial court found that, of the plaintiffs' bill, the defendant T. J. Stone should pay certain items to the amount of \$117.57; that of certain other items, amounting to \$75, two-thirds were chargeable to Stone and one-third to the bank; and that for the remainder, \$955, the bank was alone indebted to plaintiffs. The bank was found entitled to recover upon its counterclaim the aggregate sum of \$1,069.93, and for the difference, \$137.80, it was given judgment against the plaintiffs. As already indicated, the parties upon this appeal waive all dispute as to plaintiffs' claim, except those more particularly relating to services in the business culminating in the contract signed by Stone and the Farmers' Loan & Trust Company.

It is said by appellant that this contract and the negotiations leading up to it related alone to the private business and personal interests of Stone and the sale of his individual stock. There was evidence, however, from which the trial court could have reached a different conclusion, and upon these matters of fact we are not disposed to interfere with the finding. The contract is much more than an ordinary transfer of shares of stock. Its terms contemplated the complete settlement and adjustment of the bank's affairs. Mr. Stone was not to receive a cent for his stock until the debts of the bank had been paid from its assets, and then was to receive only such fractional proportion of the surplus (if any remain) as the amount of the stock transferred bore to the entire capital. Not only was the stock to be transferred, but the business itself, and

the entire body of the bank's property and assets, of every kind, were to be placed under the direct management and control of the Farmers' Loan & Trust Company; an agreement which could be carried out only by the ratification and consent of the corporation which Stone assumed to represent. From the history leading up to this contract, as well as from the apparent acquiescence in its terms and plan of settlement by the bank and all parties interested therein, we think the court below was justified in finding that plaintiffs' services were rendered for the bank, rather than for Mr. Stone individually; and, having so found, we think there was no error in releasing the latter from liability, and adjudging recovery against the former. The judgment of the district court is **AFFIRMED**.

GEORGE HALLEY, Appellant, v, GEORGE TICHENOR, Appellee.

Motion: EVIDENCE. A motion for continuance may be offered
1 and read in evidence.

Assignment of Error: APPEAL. An assignment of error not
2 argued will not be considered on appeal.

Statement of Court: REVIEW ON APPEAL. An objection to a re-
3 mark of the court to which no exception was taken will not
be reviewed on appeal.

Assignment of Errors: REVIEW. An omnibus assignment of sev-
4 eral errors will not be reviewed.

Reputation: EVIDENCE. A question calling for the general repu-
5 tation of plaintiff in the community where he lives, is proper.

Instructions: FAILURE TO SIGN. Failure of the trial judge to sign
6 his instructions in a civil case does not constitute reversible
error.

Damages: INSTRUCTION. In an action for damages for an assault,
7 where there is no evidence of the physician's charges or the
value of time lost, an instruction that no damage should be
allowed on account thereof, is proper.

Damages: INSTRUCTION. In a suit for damages for an assault, an
8 instruction based on sufficient evidence that if defendant attempted to ride his horse upon or against plaintiff, whereupon defendant, acting as a reasonable man, armed himself with a stick to ward off the attack, and thereby plaintiff's horse was frightened and he received the injuries complained of, then defendant is not liable for damages, is correct.

Appeal from Story District Court.—HON. S. M. WEAVER,
Judge.

SATURDAY, APRIL 11, 1903.

ACTION to recover damages for an assault and battery. Trial to a jury, verdict and judgment for defendant, and plaintiff appeals.—*Affirmed.*

J. F. Martin and *H. M. Funson* for appellant.

Geo. W. Dyer and *E. H. Addison* for appellee.

DEEMER, J.—During the trial, defendant introduced and read in evidence a motion and affidavit for a continuance filed by plaintiff at a previous term of court. This was objected to, but the objection was overruled; the court remarking that "the Supreme Court says it is in evidence and it can be read." This ruling was correct. *Cross v. Garrett*, 35 Iowa, 480; *Asbuch v. C. B. & Q. R. R.*, 86 Iowa, 101.

II. A witness was not permitted to answer a question as to whether or not plaintiff made complaint of pain. The ruling is not argued, and we need not give it further attention.

III. A leading question was asked a doctor, to which defendant objected. The court remarked "the doctor ought to be able to tell without being asked questions and without telling him." There was no error in the remark, and, if there were, plaintiff took no exception thereto.

IV. One omnibus assignment of error attempts to call in question several rulings made by the trial court with

reference to this doctor's evidence. On account of the form of the assignment, we shall not consider these rulings.

V. Complaint is made of a ruling on a question propounded to a witness, for the purpose of showing plaintiff's general reputation. The question called for the witness' knowledge of reputation in the community where plaintiff at the time resided and was proper. *State v. Grinden*, 91 Iowa, 505, relied upon by appellant, is not in point.

VI. The trial judge did not sign his instructions. The statutes nowhere provide that he should in a civil case, and, even if they did, his failure to do so would not constitute reversible error. Such requirement is generally held to be directory only. *State v. McCombs*, 13 Iowa, 426; *State v. Stanley*, 48 Iowa, 221.

VII. The court instructed that as there was no evidence of any charges made by the physician who treated plaintiff, and no evidence as to the value of time lost, no damages should be assessed on account of either of these items. The instruction was correct, provided the assumption as to the facts is true. We have examined the record, and find no evidence as to physician's charges. But if there had been evidence on these points, the instruction, even if erroneous, was without prejudice, in that it related simply to the measure of damage, and the jury found that plaintiff was not entitled to recover anything.

VIII. The instruction with reference to defendant's right of self-defense is complained of, not because of the propositions of law announced, but because there was no evidence to justify it. There was testimony to the effect that plaintiff attempted to run over the defendant with a horse which he was riding. This, taken with other testimony introduced by plaintiff, was sufficient to justify the court in instructing as it did on this issue. We have, perhaps, stated the instruction too broadly. It is not, strictly speaking, one relating to self-defense. We here copy it, in order that our conclusion may be the more readily

understood. It is as follows: "If plaintiff attempted to ride his horse upon or against the defendant in the highway, and thereupon the defendant, acting as a reasonable man, armed himself with a stick or similar weapon for the purpose of defense against such threatened injury, and that such movement on his part had the effect to frighten plaintiff's horse, and thereby plaintiff was injured, then defendant would not be liable for damages so inflicted." The defendant denied striking plaintiff, and claimed that the injuries he received, if any, were due to the frightening of plaintiff's horse, and that he was not responsible for this fright, in that plaintiff brought about the condition. The instruction was clearly correct.

An instruction with reference to the weight to be given an impeached witness' testimony is complained of. It was correct as far as it went. If plaintiff desired a more explicit one, he should have asked it.

IX. Lastly it is argued that the verdict is without support in the evidence. The testimony is conflicting, and, under well known rules, we cannot interfere.

The judgment is **AFFIRMED**.

WEAVER, J., taking no part.

KATIE LAMPMAN v. ANTON BRUNING, Appellant.

Seduction: PLEADINGS: SUFFICIENCY OF PETITION. The rule that
 1 when the construction of a pleading is doubtful, after giving
 the language a reasonable intendment, it should be resolved
 against the pleader, is not to be applied except upon a motion
 or demurrer attacking the pleading. After issue is joined the
 pleadings will be liberally construed.

Previous Chaste Character: ALLEGATION OF: OBJECTION TO.

2 In an action for seduction, where the defendant does not,
 before the trial, object to an allegation of the petition that
 plaintiff was of chaste character "on or about" the day she

120	167
120	699
122	686

120	167
123	414

120	167
132	493

120	167
1142	691

was seduced, as insufficient to raise the question of previous chastity and authorize a recovery for loss of character, he cannot complain thereof on appeal.

Loss of Time: VALUE OF. In an action for seduction, where the
3 only evidence of the value of her time lost is that of plaintiff, which shows her avocation to have been a teacher at a salary of from \$30 to \$34 per month, her damage in this respect is what she could earn as a teacher.

Medical Attendance: ALLOWANCE FOR. In an action for seduction, where plaintiff testifies that the doctor's bill was a
4 certain sum, which has not been paid, she is entitled to an allowance, and the reasonableness of the sum may be left to the jury.

Consideration of Instructions by Jury. A direction to the jury to
5 consider each instruction in the light of, and in harmony with every other instruction given, is commended, and is not subject to the criticism that it is liable to confuse.

Appeal from Carroll District Court.—HON. Z. A. CHURCH,
Judge.

SATURDAY, APRIL 11, 1903.

ACTION for seduction. Verdict against defendant, upon which judgment was entered, and he appeals.—*Affirmed.*

Salinger & Korte for appellant.

F. M. Davenport and *W. H. Beach* for appellee.

LADD, J.—The petition alleges that plaintiff was, "on or about the 20th day of January, A. D. 1898, an unmarried woman of chaste character; * * * that on or about said 20th day of January, 1898, the said defendant, with artifice, persuasion, and entreaties, and under promise of marriage, did seduce, debauch, and carnally know the plaintiff, and as a result of sexual intercourse the plaintiff was, on or about the 29th day of September, A. D. 1898, delivered of a female child."

Under these allegations the question of her previous chastity was submitted to the jury, and, upon an affirmative finding, loss of character authorized to be considered as an element of damages. Appellant insists that the allegations were insufficient to raise the issue, for, as he contends, plaintiff might have been both chaste and unchaste within the period described as "on or about January 20, 1898." It may be conceded that, under the statute defining seduction, "previous chastity" means up to and at the very time of seduction (*State v. Gunagy*, 81 Iowa, 177), and also, because of the strictness and accuracy exacted in the averments of an indictment, that the above allegations might be too indefinite to charge the criminal offense. In an early Minnesota case, the court went so far as to say that an averment of chastity previous to the day on which the seduction was definitely alleged to have occurred was insufficient, for, "though chaste at all times previous to the eleventh day of May, she may on that day, and before the alleged seduction, have become unchaste." Whether the possibility of so improbable a situation should be given weight, even in construing an indictment, we shall not stop to determine. Certain it is no such nicety and strictness should be injected into the civil practice, otherwise many evils of the former system would linger to vex, annoy, and impede the administration of justice. The rule that nothing may be taken by intentment in construing an indictment has no application to pleadings in civil actions. The true meaning of the pleader is to be ascertained from a fair construction of the language employed, and this accepted. The rule that when "the construction is doubtful, after giving to the language a reasonable intentment," as laid down in *J. Thompson & Sons Mfg. Co. v. Perkins & Sons*, 97 Iowa, 607, it should be resolved against the pleader, is not to be applied save when the attack is by motion or demurrer. It is not then adopted because a feature of common-law

pleading, but as an aid in securing definiteness and precision in the settlement of issues. "The rules by which their sufficiency are to be determined are those prescribed by the Code." Code, section 3557.

After issue is joined on the merits, notwithstanding section 2951 of the Revision of 1860. is not found in the Code, the pleadings will be liberally construed, with a view to effectuating substantial justice between the parties. *Gray v. Coan*, 23 Iowa, 344; *Foster v. Elliott*, 33 Iowa, 216. Especially is this true after trial, for "an error or defect in the proceeding which does not affect the substantial rights of the adverse party" is to be disregarded (Code, section 3601) even though such errors are in the pleadings. *Coates v. Davenport*, 9 Iowa, 227; *Doniphan v. Street*, 17 Iowa, 317. While nothing is to be assumed in favor of the pleader unless averred, he is to be accorded the advantage of every reasonable intendment, even to implications necessarily inferred, regardless of technical objections or informalities. *Sell v. Miss. R. Logging Co.*, 88 Wis. 581 (60 N. W. 1065); *Moffat v. Fulton*, 132 N. Y. 507 (30 N. E. Rep. 992); *Keen v. Mitchell*, 13 Mich. 207; *Jack v. Weiennett*, 115 Ill. 105 (3 N. E. Rep. 445, 56 Am. Rep. 129); *Ornman v. Mannix*, 17 Colo. 564 (30 Pac. Rep. 1037, 17 L. R. A. 602, 31 Am. St. Rep. 340). See chapter on "Construction of pleadings," 4 Ency. P. & P. 741.

The petition, as we think, fully apprised the defendant that the plaintiff would claim on the trial that she had been chaste at the time of seduction. By answering to the merits, without demanding a more definite statement, and proceeding to trial, he accepted the averment as sufficient, and ought not now be permitted to complain.

II. The court advised the jurors, in estimating the damages to be allowed, to "consider, first, loss of time by plaintiff, the expense incurred for medical attendance while sick and the like; second, physical suffering;

2 PREVIOUS
chaste char-
acter: allega-
tion of: ob-
jection to.

third, the mental anguish, loss of character and social standing, and sense of shame caused by the seduction." Appellant contends that, though there was proof of loss of time, its value was not shown. The plaintiff's avocation was that of school teacher. She had taught ten terms at a salary of from \$30 to \$34 a month, spending her vacations from May till September at the home of her parents. She was confined September 29, 1898, being sick twelve days, and, because of resulting ill health, had been unable to resume her work as teacher. Whether she had done anything else does not appear. If it be conceded, however, that, in the absence of some showing that she had been able to do nothing, or what she had earned since her sickness, before she might recover for more than the loss of twelve days, the reasonable value of that time was to be inferred from evidence that but for her confinement she would likely have been teaching school and hence the value of the time lost would be what she would have earned but for her misfortune.

In another respect the instruction is said to be erroneous. The only evidence relating to medical attendance was that of plaintiff, who testified that "Dr. Jensen, of Arcadia, attended me. His bill was ten dollars. It has not been paid." From this the obligation to pay was to be inferred, and allowance, without actual payment, permissible. *Varnham v. Council Bluffs*, 52 Iowa, 698. But appellant says that "what the doctor charged does not furnish proof of what expense was reasonable." Such items are rarely the subject of controversy in damage suits, and where the services rendered are of a nature likely to be familiar to the jury, and the charge unquestioned, its reasonableness may be safely left to their determination. As directly in point, see *Flanagan v. B. & R. Co.*, 83 Iowa, 639. See, also, *Knapp v. Ry.*, 71 Iowa, 41; Watson on Damages for Personal Injuries, section 530; *Murray v. Missouri P. R. Co.*, 101 Mo. 236

3. Loss of time:
value of.

4. MEDICAL
attendance:
allowance for.

(18 S. W. Rep. 817, 2 Am. St. Rep. 61); *Western Gas Const. Co. v. Danner*, 36 C. C. A. 528 (97 Fed. Rep. 882). In *Bowsher v. Ry.*, 113 Iowa, 16, relied on by appellant, an instruction was held erroneous because authorizing recovery for the amount paid for medical services, in the absence of any proof of payment, and instead of their reasonable value. The case is not in point.

III. Fault is also found with the eighth instruction, on the ground that the jury might have become confused in attempting to follow it. That it is not subject to this criticism is manifest from reading it. We set it out in order to commend the practice not only of cautioning the jurors of their obligation to follow the instructions of the court, but of guarding them against being misled by giving undue importance to one paragraph of the charge, to the neglect of some other on the same subject:

"You are to try the question in the case submitted to you upon the testimony introduced upon the trial, and upon the law as given you by the court in these instructions. The court, however, has not attempted to embody all the law applicable to this case in any one of these instructions, but in considering any one instruction you must construe it in the light of and in harmony with every other instruction given, and, so considering and so construing, apply the principles in it enunciated to all the evidence admitted upon the trial."—AFFIRMED.

GEO. W. ALLAN, Appellant, v. A. F. BEMIS, Appellee.

Sale of Land: STATUTE OF FRAUDS: CHANGE OF POSSESSION. EVIDENCE. Where a tenant in possession under a lease claims to have made an oral contract of purchase, mere proof of the making of improvements by the tenant, unaided by other competent evidence, will not establish a change of possession

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120	172
134	627

as lessee to that of a vendee so as to take the case out of the statute of frauds and place it within the exception provided by Code, section 4626.

Nature of Possession: PAYMENT OF RENT. Payment of rent by a
2 tenant after the alleged oral contract of purchase was made, negatives the idea that his possession was that of a vendee.

Written Admission of Contract: STATUTE OF FRAUDS. A receipt
3 for rent notes, providing that if the tenant shall pay the landlord \$4,000 "on the purchase price of farm, and deliver a mortgage for the whole amount" the lease and notes shall be returned, is insufficient as a written admission of an oral contract of purchase to take it out of the statute of frauds, and the court cannot look beyond the writing itself to ascertain the terms of the contract.

Appeal from Polk District Court.—HON. S. F. PROUTY,
Judge.

SATURDAY, APRIL 11, 1903.

DEFENDANT is the owner of a farm situated in Polk county, consisting of two hundred and twenty acres. It is admitted that on March 1, 1899, plaintiff entered into the possession and occupancy of said farm as a tenant under a written contract of lease with defendant, the term beginning on said day, and to end on March 1, 1900. Plaintiff alleges that in August, 1899, an oral agreement was entered into between himself and defendant, whereby he agreed to purchase and defendant agreed to sell said farm at the agreed price of \$56 per acre, and plaintiff says that defendant forthwith delivered possession of said farm to him, and that he then entered into possession, and made valuable improvements under and by virtue of such agreement. The petition contains no allegation to the effect that a time was then fixed or agreed upon at which the contract was to be otherwise carried out. It is also alleged in the petition that in furtherance of said oral contract, and on February 5, 1900, plaintiff met defendant at the office of A. M. Miller, Esq., the attorney of defendant,

at his office in the city of Des Moines, and that it was then agreed "that plaintiff lease the land * * * for the year 1900 at \$660; that the agreement hereinbefore described of defendant to sell said land to plaintiff * * * should stand, and that \$4,000 of the purchase price should be paid * * * March 1, 1900, and the balance * * * to be secured by mortgage, payable at any time, and in the sum of not less than \$500 per annum, with six per cent. interest; that it was further agreed that plaintiff forthwith sign a written lease for the year 1900, and two rent notes of \$330 each, payable to defendant, which should be left in escrow with said A. M. Miller, and should be canceled and surrendered to plaintiff in case he pay the \$4,000, and execute the mortgage on or before March 1, 1900, otherwise to be delivered by Miller to defendant." Plaintiff says that thereupon he signed a lease and two rent notes, and deposited the same with said Miller in escrow, taking his receipt therefor, in words and figures as follows: "Des Moines, Iowa, Feb. 5th, 1900. Received of G. W. Allen, lease and two notes of \$330 for rent of A. F. Bemis farm of two hundred and twenty acres for 1900, and if said G. W. Allen pays A. F. Bemis \$4,000.00 on the purchase price of his farm, at \$56 per acre, and the balance due him, and delivers to A. F. Bemis a mortgage for the whole amount due said A. F. Bemis, including the purchase price of said real estate, said mortgage to be optional and bear six per cent., payment to be not less than \$500.00 per year, interest, then said lease and notes are to be returned to G. W. Allen, and if said payment is not made by March 1st, 1900, then said lease and notes are to be delivered to A. F. Bemis. [Signed] A. M. Miller." It is said that this receipt was written and signed by said Miller by direction and under the dictation of defendant, and acting as the agent and attorney of defendant. Plaintiff further says that on March 1, 1900, he notified defendant that he was ready to complete his purchase of the land, and that de-

defendant refused to carry out said agreement; that March 6, 1900, he again offered to perform, and demanded performance of defendant, which was refused, but that on said day defendant adopted and ratified the said written receipt and agreement by writing thereon as follows: "I extend the time to March 12, Tuesday. [Signed] A. F. Bemis." It is then alleged that on March 12, 1900, plaintiff offered and tendered to defendant the total purchase price of said real estate, and demanded a conveyance thereof, all of which was refused. Matters of damages are alleged, and judgment demanded. The answer admits the fact of the execution of the written receipt, the indorsement thereon in the words alleged, and denies all other allegations in the petition. At the close of the evidence for plaintiff the court, on motion, directed a verdict in favor of defendant, and entered judgment against plaintiff for costs. Plaintiff appeals.—*Affirmed.*

Carr & Parker and *W. C. Marquis* for appellant.

Cummins, Hewitt & Wright and *L. Kinkead* for appellee.

BISHOP, C. J.—On the trial plaintiff was permitted to testify that in August, 1899, a conversation was had between himself and defendant relative to a purchase and sale of the farm in question. He says that the conversation arose by his calling attention to some repairs and improvements which he says defendant had promised to make, and for which he was asking, whereupon defendant suggested that he (plaintiff) might buy the farm, and make his own improvements. Continuing, plaintiff says he then offered to buy the farm at \$56 per acre, and was told by defendant that he could have it at that price. Being asked how much money he wanted down, defendant replied, "You can pay me three or four thousand dollars the first of March, and the farm is yours." Plaintiff says

that he suggested "that it would be better to have a contract on this," to which defendant made reply, "You go out and fulfill your part of it, and I will mine." Plaintiff testifies that he then said, "I will take possession now, and go to work and make the improvements, and when the first of March comes, if I fulfill my part of it, you will yours?" That to this defendant said, "Yes, I honor my word, and when I tell you I will do anything it is just as good as it is in a contract." The foregoing is all the direct evidence offered or introduced by plaintiff to establish the contract of purchase and sale alleged by him, and upon which he grounds his action. All such evidence was objected to by defendant at the time it was offered as incompetent, and in contravention of the statute of frauds, and the same was received subject to the objections. Plaintiff also offered evidence to the effect that following the conversation above related, and during the fall of the same year, he made improvements on the farm in the way of putting in a portion of cellar wall, tiling to drain the cellar, etc. This evidence was also objected to at the time offered as incompetent, and for the reason that plaintiff relies upon an oral contract for the sale and conveyance of lands, and that parol evidence is not admissible under the circumstances to prove a change of holding from lessee to purchaser. The evidence was admitted subject to final ruling, which was reserved.

It is admitted by plaintiff that after taking possession under the lease of March 1, 1899, he thereafter continuously resided upon said farm; that for the rent under said lease he executed to defendant two notes, each for \$330; that one of such notes was paid by him in October, 1899, and the other on February 21, 1900, both payments being made to the defendant. By the ruling on the motion to direct a verdict the trial court held, in effect, that the evidence introduced was incompetent, and therefore insufficient for the purpose offered, and that the objections made

thereto should have been sustained. The correctness of the position thus assumed is the first question presented for our consideration.

By section 4625 of the Code—commonly designated as the "Statute of Frauds"—it is declared in substance, that, except when otherwise specially provided, no evi-

1. STATUTE of frauds: change of possession: evidence. dence of any contract providing for the creation or transfer of any interest in lands, except leases for a term not exceeding one year, is competent unless such contract be in writing and signed by the party charged or by his authorized agent. Exceptions to the foregoing rule are furnished by section 4626, following, wherein it is further declared that the provisions of section 4625 do not apply where the purchase money, or any portion thereof, has been received by the vendor, or where the vendee with the actual or implied consent of the vendor has taken and held possession of the land in question under and by virtue of the contract. Counsel for appellant concede that the contract here alleged and sought to be established is clearly within the bar of the statute unless saved by virtue of the exception found in section 4626. It is their contention that the record shows a change of possession from appellee to appellant, with the consent of the former, following the making of the alleged contract, and under and by virtue thereof; that, accordingly, parol evidence of such contract was properly admitted. The question of the competency of the evidence was for the court, of course, and, before the admission thereof could be justified, the plaintiff must have produced other evidence tending to prove a change of possession, so far, at least, as to entitle him to have such question of possession submitted to the jury for a verdict. Now, we have a case where a tenant is in possession, and it is clear that before plaintiff can be entitled to recover he must establish that with the making of the alleged contract his

possession as tenant ceased, and that his possession thereafter held was as a purchaser under and by virtue of such contract. *Mahana v. Blunt*, 20 Iowa, 142. In that case it is said: "The possession of the premises by the plaintiff is abundantly proven in this case, and if such possession was distinctly referable to the title under the verbal contract, there would be no difficulty in the case. But this plaintiff was a tenant of the defendant at the time of the alleged verbal contract for purchase, and it has been repeatedly held, and is now a well settled doctrine, that the continuance in possession by a tenant cannot be deemed a part performance, or to be such possession as to take the case out of the statute. The possession must unequivocally refer to and result from the agreement." See, also, *Wilmer v. Farris*, 40 Iowa, 309; *Benedict v. Bird*, 103 Iowa, 612.

Counsel for appellant do not deny the controlling force of the cases above cited, but they point out that in the case at bar valuable improvements were made by appellant in faith of the contract and they urge that proof of such fact is sufficient to take the case to the jury upon the question of a change of possession. To this we cannot yield our assent. To say that a tenant, while in possession as such, may make improvements, and then predicate thereon alone a claim of change of possession sufficient in character to avoid the statute and permit the introduction of oral evidence of a contract of sale, would be violative of every purpose which underlies the statute. Such a rule, if sanctioned, would put it into the hands of any party in possession of real estate under whatsoever arrangement, by making some character of improvement, to base thereon a claim of change of possession sufficient to take the case out of the statute. To permit a party in possession solely by his own act to create a condition which, aided by his own testimony, would be sufficient to bring his case within the exception provided by section 4626, would be at once

subversive of both the letter and the spirit of the statute. As was said in *Mahana v. Blunt*, *supra*, "the wisdom of the statute has been verified by the experience of the ages, and is too well grounded and settled to either justify or allow us to infringe upon its letter or spirit, even in a case of apparent hardship or faithlessness." As we read them, no one of the authorities cited and relied upon by counsel for appellant is out of harmony with the doctrine thus stated. That a tenant may contract to purchase, while in possession as such, may be readily conceded, and that he may point out improvements made by him as evidence tending to prove that possession is held as purchaser, and not as tenant, is not to be doubted. Especially is this true where the improvements made are such in character and extent as to be inconsistent with a continued possession as tenant. What we hold—and it is the rule of all the cases to which our attention has been called—is that mere proof of the making of improvements by a tenant, unaided by competent evidence of any other facts, cannot be accepted as sufficient to establish a change of possession, and thus bring a case within the exception provided in the statute. Were the rule otherwise, however, we think the holding of the court below in the respect under consideration was demanded by the state of the record before it.

Not only does it appear that plaintiff was a tenant at the time the oral contract is alleged to have been made, but we think it must be said that he continued to be a tenant throughout the term of the written lease. The admitted fact that in October and February following, he paid the rent reserved in the lease, and strictly in accordance with the terms thereof, gives character of itself to his possession, and negatives the idea that such possession was under the alleged contract, and not as a tenant under the lease.

II. Plaintiff offered in evidence the writing, a copy of which appears in his petition and is hereinbefore set

2. NATURE of
possession:
payment of
rent.

out. This was objected to, and the objection sustained.

3. WRITTEN admission of contract: statute of frauds. The grounds of the objection were that by the terms of the writing no obligation on the part of defendant is created, and that the same does not, by its terms, constitute an agreement or memorandum of an agreement by defendant for the transfer of an interest in lands, as required by the statute. It is not claimed by counsel for appellant that such writing of itself constitutes the contract for the breach of which this action is brought. It is their contention that the same is a written admission of the oral contract previously made as alleged, and that it is sufficient in character to establish the making of such oral contract. Passing the collateral questions argued at some length in respect of the character of the agency of Miller and the lack of definite description of the property, we readily reach the conclusion that no effect can be given the writing such as appellant contends for. It contains no reference to any prior agreement, and by its terms is confined to matters then presently under consideration. Given the most liberal interpretation possible and it is simply a receipt for the lease and rent notes, with the provision added that if a purchase of the farm shall be made by Allen by March 1, 1900, at a price named, the lease and notes are to be redelivered to him. Thereby Bemis does not agree to sell, nor does Allen agree to purchase. That parties may by writing make admission of a prior oral contract or agreement to sell lands is not to be doubted. And an oral contract thus established may be enforced as of the time made as fully as the subsequent writing makes disclosure thereof. It is well settled, however, that in all such cases the court cannot look beyond the writing to ascertain the terms, conditions, or provisions of the contract. *Vaughn v. Smith*, 58 Iowa, 553; *Watt v. Wis. Cranberry Co.*, 63 Iowa, 730; *Leather Co. v. Porter*, 94 Iowa, 117; *Peoria Co. v. Babcock* (C. C.) 67 Fed. Rep. 892; *Grafton v. Cummings*, 99 U. S. 100 (25 L. Ed. 366);

Ridgway v. Hills, 66 Ind. 475. It was the sole province of the court to construe the writing offered in evidence. *Daly v. Kimball Co.*, 67 Iowa, 132; *Clement v. Drybread*, 108 Iowa, 701. Being insufficient in and of itself to establish the making of the oral contract upon which the plaintiff grounds his action, it must be held that the objection thereto was properly sustained. No farther evidence having been offered by plaintiff with reference to the contract alleged, it follows that the verdict in favor of defendant was rightfully directed.—AFFIRMED.

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McCORMICK HARVESTING MACHINE COMPANY, v. M. V. LAMBERT, Appellant.

Principal and Agent: EVIDENCE OF AGENCY. In a suit to recover
1 for a binder shipped in care of a third party, it is competent for the purpose of establishing agency in the third party to show that he had handled plaintiff's machines and had sold them and taken notes in settlement payable to plaintiff.

Authority of Agent: NOTICE: EVIDENCE. In the sale of a binder
2 shipped to defendant in care of a third party on condition that it should be given one day's trial, and if it failed to work well immediate notice should be given plaintiff or its agent, the evidence on the question of agency of the third party is considered and held sufficient to warrant the jury in finding that such third party was authorized to receive notice of the failure of the binder to work.

Same. The fact that men came to repair a machine in response
3 to notice given the agent of its failure to work, is sufficient evidence of the agent's authority, in the absence of a contrary showing.

Appeal from Carroll District Court.—HON. S. M. ELWOOD,
Judge.

SATURDAY, APRIL 11, 1903.

ACTION at law to recover on an order for a harvesting machine. There was a directed verdict for the plaintiff, and a judgment thereon, from which the defendant appeals.—*Reversed.*

Lee & Robb for appellant.

Salinger & Korte for appellee.

SHERWIN, J.—The order upon which this action is based provided for the delivery of a machine to the defendant at Coon Rapids, consigned to the care of “Jones.” Upon its delivery to the defendant, he was to settle therefor by note due January 1, 1901. The order contained the usual warranty, and provided for one day’s trial of the machine, with a stipulation, also, that if it did not work well immediate notice should be given the plaintiff or its agent, and “allow time to send a person to put it in order,” and if not then made to work well it was to be “returned at once to the agent of whom he received it.” The binder was shipped to one Jones at Coon Rapids, and received of him by the defendant.

The defendant offered evidence tending to show that said Jones had been handling the plaintiff’s machines and extras for several years, and that others had bought machines of him, and had settled with him therefor by giving their notes payable to the plaintiff. This testimony was all stricken out upon the plaintiff’s motion, and in so ruling the court erred. All of these matters were competent as tending to prove that Jones was in fact the agent of the plaintiff, and further, they were competent as tending to show a course of dealing from which the agency might be presumed. Mechem on Agency, sections 83-86; *Van Werden v. Life Insurance Society*, 99 Iowa, 621. This testimony, in connection with the order itself, which designated Jones as the agent who

1. EVIDENCE of
agency.

was to deliver the machine to the defendant, and as the one to receive it in case it was returned, was certainly sufficient to warrant a finding by the jury that Jones was an agent authorized to receive notice of the failure of the machine to work.

There was testimony that the defendant sent word to Jones, by one of the latter's sons, that the binder did not work well, and that the next day another son and a man by the name of Smith visited the defendant's farm and attempted to remedy the alleged defects in the machine. This testimony was stricken out also, on the ground that the defendant had not shown that Jones or Smith was authorized to so act. As we have already seen, there was evidence tending to show that Jones had charge of this machine.

A notice to him, then, was sufficient; and if, in response thereto, his son and an expert appeared upon the scene and undertook to put it in good running order, it can hardly be said there is no evidence of authority to do so. The very fact that they were there in answer to the notice is sufficient evidence of authority, in the absence of any showing to the contrary.

The plaintiff was entitled to a reasonable time in which to get to the machine and to make it work, and it is ordinarily a question for the jury whether such time has been given or not. There is nothing before us to show that the plaintiff did not have all the time it wanted for that purpose.

The court erred in striking out the testimony to which we have referred, and erred further in directing a verdict for the plaintiff. The judgment is REVERSED.

H. Y. BARRETT, Appellant, v. DES MOINES MUTUAL HAIL
AND CYCLONE INSURANCE ASSOCIATION.

Insurance: SETTLEMENT OF ASSESSMENT: FORFEITURE: WAIVER.

- 1 An agent of a mutual hail association, authorized simply to collect delinquent assessments, settled with a suspended member by allowing him a claimed loss in part payment and accepting his note for the balance, the proceeds of which he remitted the company, with full information as to the settlement. The company notified the assured that the claimed loss could not be allowed but retained the proceeds of the note, and subsequently notified him that an assessment for another year was due. *Held*, that the company by its conduct had ratified the act of the agent, which restored the assured to membership, and had thereby waived its right to claim a forfeiture of the policy.

Pleadings: INSUFFICIENCY OF ALLEGATION: FAILURE TO OBJECT:

- 2 WAIVER. In an action on an assessment policy of insurance, the insufficiency of a general allegation that defendant has waived the suspension of a member, though a legal conclusion, is waived by failure to properly object thereto.

Appeal from Plymouth District Court.—HON. F. R. GAY-
NOR, Judge.

SATURDAY, APRIL 11, 1903.

ACTION to recover a loss under a policy in a mutual hail insurance company. Defense, that at the time of the loss plaintiff was under suspension from the company on account of failure to pay assessments. Trial without a jury. Judgment for defendant, from which plaintiff appeals.—*Reversed*.

Edwin J. Stason for appellant.

Carr & Parker for appellee.

McCLAIN, J.—The trial was upon a written stipulation as to the facts. The substantial facts, as they appear from

the stipulation, are as follows: The plaintiff became a member of the defendant company in June, 1899, under an agreement for insurance of his crops against hail to the extent of \$1,000, for a period of five years. In August of that year an assessment on the members was made, the amount of the assessment against plaintiff being \$38, which amount was payable by plaintiff on the 1st of October of that year. Failing to make payments, plaintiff was duly notified of his suspension from the company on that account, in accordance with the provisions of its articles and by-laws. This suspension continued until the 10th day of August, 1900, when one Miller, who was employed by the defendant company only for the purpose of collecting delinquent assessments, called upon the plaintiff to secure payment of the amount due from him. Plaintiff then claimed that he had a loss to his crops from the hail in 1899 to the amount of \$18, which had not been paid, and Miller on that date accepted plaintiff's negotiable note for \$20, with the agreement that plaintiff should be allowed the amount of his claimed loss. Miller negotiated the note, and reported the settlement with plaintiff to the defendant company on the 13th of August, delivering to defendant the proceeds of the note. The president of the company thereupon wrote to plaintiff that the company was not liable to him for the \$18 loss, and that the claim therefor could not be allowed. It is conceded that Miller had no authority to adjust losses, and that no notice of the \$18 loss had been given to the defendant within the time and in the manner required by the contract of insurance, but the defendant company accepted from Miller the proceeds of the \$20 note with full information as to the adjustment which Miller had made with plaintiff, and has since retained the amount of such proceeds. On the 12th of August—that is, between the date of the transaction between Miller and plaintiff and the time when Miller reported the adjustment and collection to defendant—

plaintiff suffered a loss by hail to the full amount of his insurance, and that, so far as the record now shows, such amount is due by defendant to plaintiff, if plaintiff was at the time of the loss not under suspension for nonpayment of the assessment of 1899.

If the acceptance of the note would have been sufficient to restore plaintiff to membership in the association, provided the note was for the full amount of plaintiff's

1. SETTLEMENT of assessment: forfeiture: waiver. assessment, and if, by accepting from Miller the proceeds of such note, the defendant ratified his settlement with plaintiff, and is bound as effectually by such settlement as though it had been made directly between defendant and plaintiff at the time of the negotiation thereof with Miller, assuming to act as agent, the question arises whether such settlement restored plaintiff to membership. It is well settled that an acceptance of part payment, although stipulated to be in full extinguishment of an indebtedness, does not constitute full payment. If plaintiff had however, an unliquidated claim against defendant, which he might have introduced as a set-off against defendant's claim for the assessment, then an agreement in settlement of this unliquidated claim to accept less than the full amount of the assessment would be a valid compromise, and the acceptance of the \$20 in full of the assessment, after deducting the unliquidated claim, would be a settlement based on a sufficient consideration, and therefore valid and binding. *Pollman, etc., Co. v. St. Louis*, 145 Mo. 651 (47 S. W. Rep. 563); *Ostrander v. Scott*, 161 Ill. 339 (43 N. E. Rep. 1089); *Tanner v. Merrill*, 103 Mich. 58 (65 N. W. Rep. 664, 81 L. R. A. 171, 62 Am. St. Rep. 687); *Marion v. Heimbach*, 62 Minn. 214 (64 N. W. Rep. 286); *Greenlee v. Mosnat*, 116 Iowa, 534.

The sole question as to payment, then, is whether the claim of plaintiff for the loss was such a claim as would support a settlement by way of compromise. It is, of

course, true that the absolute legal validity of the claim which is compromised is not essential to the validity of the agreement which is made by way of compromise. If the claim is made in good faith, as one which might be enforced in law or equity, then a settlement thereof will be sustained. Turning, now, to the facts as shown by this record for the purpose of ascertaining whether the claim of plaintiff for loss was such a claim as would support a settlement, we find that this loss was one of which no notice had been given to the company, and on which no demand had been made by plaintiff until long after the time when there should have been such notice and demand in order to give rise to any obligation of the defendant under the contract of insurance. Nor is it stipulated that the claim was made in good faith and based upon any alleged liability of the defendant. The stipulation merely recites that in the transaction with Miller "plaintiff claimed that he had a loss to his crops from hail in July or August, 1899, which the defendant, he claimed, had not paid, and of which loss the said plaintiff had in fact never given any notice to the defendant." It appears, therefore, that plaintiff's claim was, not that defendant was liable to him under the terms of the contract of insurance, but that he had sustained a loss, which, had he taken steps to perfect it, might have been made the basis of a valid claim. It seems to us that the stipulation does not go far enough to show any contention that the asserted claim was valid. The case, therefore, was simply this: Conceding that there was no legal liability, the defendant (acting through its unauthorized agent, Miller, whose acts we concede for the purpose of the case to have been fully ratified) was willing to accept \$20 in full payment of plaintiff's assessment of \$38, and remit to plaintiff the balance, without regard to the genuineness of plaintiff's claim. The situation was not different from that involved in the ordinary case where the creditor, feeling uncertain as to the collec-

tion of the amount of an admitted indebtedness, accepts part payment in full satisfaction. Such a settlement is not binding, and the creditor is not under obligation to return the part payment actually received before proceeding to collect the balance which is in fact unpaid. *Home Fire Ins. Co. v. Skoumal*, 51 Neb. 655 (71 N. W. Rep. 290); 1 Beach on Contracts, sections 173-4.

But we think that the question of whether plaintiff satisfied by payment or valid compromise the full amount of his \$38 assessment is not the ultimate question in this case. While it is not mentioned in the stipulation that plaintiff and Miller were negotiating with reference to the restoration of plaintiff to membership in the defendant association, nevertheless that must have been a matter as much within the contemplation of the two as the extinguishment of plaintiff's legal liability for the assessment, for, whenever plaintiff's indebtedness to the defendant was adjusted to defendant's satisfaction, his suspension was terminated, and he became once more a member in good standing. With reference to the termination of plaintiff's suspension and his restoration to good standing as a member of the association, the legal satisfaction of the \$38 assessment was not conclusive. We think there can be no doubt that whenever an association of this kind accepts what it indicates to the member as a sufficient satisfaction of the dues for which he is suspended and leads him to think that he is thereby restored to membership, it is estopped from afterwards saying that his restoration did not take place. It cannot be that such an association can lead the member to think that he has done all which the association requires him to do, and then, after a loss has occurred, insist that what he did was not sufficient in legal effect to work a restoration. Unquestionably plaintiff must have given the \$20 note in the belief that after it was given he would be entitled to the benefit of his contract of insurance from that time. In this view of

the case it is immaterial whether the note taken amounted to payment of the indebtedness, or whether the agent had authority to adjust plaintiff's old claim or accept less than the full amount of the assessment. The agent certainly did have authority to settle this assessment with the plaintiff, and determine on what terms he should be restored to membership in the company. No further action of the company than the adjustment of this assessment was necessary to restore the plaintiff to full membership. Even if the agent had not authority to accept less than full payment, the company accepted the benefits of the transaction, and the retention thereof was a full ratification of the agent's acts.

With reference to the retention of the benefits of the transaction, it is urged that, as defendant was entitled to the amount received, without regard to any agreement by the agent to allow the amount of the old loss or restoration of the plaintiff to membership, the retention of that amount would not be a ratification. In other words, that the defendant might ratify so much of the action of the agent as resulted in securing the proceeds of the \$20 note, without ratifying the portion of the transaction which consisted of extinguishment of the balance of the claim and restoration to membership; and counsel for defendant cite some authorities which they claim support their views, but these authorities are cases of attempted rescission of a contract, not attempted repudiation of the acts of an agent, and between the two there is a manifest difference. No authorities are cited, and we know of none, which will justify the view contended for that, when an agent acts without authority in securing a settlement, the principal can retain the benefit of the settlement by the agent, and disavow the effect thereof. The proposition is too elementary to require reference to authorities.

If there were any controversy with reference to the understanding with which the settlement with plaintiff

was made and the proceeds thereof retained by the defendant, it is put at rest by the subsequent act of the defendant in notifying the plaintiff, on the 19th of September, 1900, that an assessment of \$38 for that year was due. This, it will be observed, was subsequent to all the matters to which we have heretofore referred. The act of defendant is admissible for the purpose of throwing light on its intention in retaining the benefit of the settlement made August 10th, and reported to it on the 13th. That the subsequent acts of the parties may throw light on the intention involved in a previous transaction is a rule of evidence.

Counsel for defendant contend that there was no issue as to whether defendant had waived its right to claim a forfeiture or suspension of plaintiff's certificate because of

2. INSUFFICIENCY of allegation: failure to object: waiver.
- plaintiff's neglect to pay the assessment for 1899 promptly when due. But it is alleged in the petition that defendant had waived suspension of the policy on this ground, and,

while that allegation may have been a mere legal conclusion, nevertheless, no objection having been taken on that ground, it cannot be ignored as presenting an issue of fact. It will not do to allow a general allegation of that character to go unchallenged until the conclusion of the case, which is tried on the issue thus informally presented, and then contend that no such issue was before the court. While it is true that a waiver must be pleaded, it is also true that insufficiency of the pleading of a waiver, where it is apparent that a waiver is intended to be pleaded, may be itself waived by failure to seasonably raise the objection.

We have considered all the questions that are likely to occur on a new trial, and, finding that there was error in the action of the lower court in rendering judgment for defendant, such judgment is REVERSED.

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135	684

120	191
136	228

S. H. BROWN, Appellant, v. VESTA V. HOLDEN, Appellee,
GEORGE A. ALLEE *et al.*, Appellants.

Mortgages: FORECLOSURE: CHANGE OF VENUE. Where action is

- 1 brought by the assignee of a real estate mortgage to foreclose the same, and the defendant by a cross-petition against the original mortgagees and others claims damages for fraudulent representations inducing the execution of the mortgage, in case a cancellation of the same is not decreed, the defendants in the cross-petition are not entitled to a change of venue to the respective counties of their residence.

Evidence: FALSE REPRESENTATIONS. On the issue of fraud in

- 2 procuring a mortgage given for the difference in value on exchange of properties, the evidence is examined and held to show that the execution of the mortgage was induced by the fraudulent representations of the mortgagees and their agent, who was also secretly acting as the agent of the mortgagor.

Sale of Mortgage: BONA FIDE PURCHASER: EVIDENCE. Where one

- 8 purchases a mortgage, even for value and before due but with a knowledge that the maker claims a defense which has not been waived or satisfied, he does so at his peril, and this is true though the purchase is through an agent having such knowledge. Evidence considered and held to bring the case within the rule.

Appeal from Decatur District Court.—HON. H. M. TOWNER,
Judge.

SATURDAY, APRIL 11, 1903.

IN June, 1898, the defendant Holden lived at Fairview, in Jones county, and there owned an acre of ground, on which was a store building. She carried on business in the store, and had therein a small stock of general merchandise. At the same time G. A. Allee and J. W. Allee, living at Belle Plaine, Benton county, were the owners of a farm, consisting of one hundred and twenty acres, in Decatur county. About the time stated said parties

entered into a contract in writing for the exchange of their respective properties. The material provisions of such contract are as follows: The parties agree to exchange properties, subject to the inspection of the farm by Mrs. Holden. If exchange is made, the farm, including share of crops, is to be valued at \$4,800, the store building and ground at \$2,000, and the stock to be invoiced at wholesale cost; Mrs. Holden to give mortgage back on the land for balance, the same to become due in one year, with six per cent. interest; the deal to be closed within four weeks if Mrs. Holden is satisfied with the farm. In the contract the farm is said to be about one and one-fourth miles from Van Wert, and is represented as "about sixty-five acres in cultivation, the balance meadow and pasture; land is rolling; a new five-room house; two wells; board stable and other outbuildings; all the land can be cultivated except about twelve acres in timber and pasture; good black soil, not stony and sand." It is further provided that Allee is to go with Mrs. Holden and show her the farm when she is ready to go. Within a few days after the making of such contract, Mrs. Holden and J. W. Allee went to Decatur county, and drove out to the farm. Upon their return an invoice was made of the goods owned by Mrs. Holden; the value thereof, as shown by such invoice, being fixed at \$830. Thereupon an exchange was effected by proper instruments in writing, and there was executed by Mrs. Holden to G. A. Allee, on account of the difference in values and to cover an item of indebtedness due from her on goods in the store which was assumed and agreed to be paid by Allee, a note for \$2,200, and mortgage to secure the same upon the farm in question. It is alleged that such note and mortgage were subsequently, and before due, assigned for value to the plaintiff, S. H. Brown, and this action is brought by him to recover thereon. In her answer the defendant Holden admits the execution of the note and mortgage, but alleges that the

same was procured by fraud and false representations; that the same was and is without consideration and void. She denies that plaintiff became the owner of said note and mortgage before maturity thereof; denies that he is the owner thereof, or that he ever paid anything therefor; and alleges that he (said plaintiff) was a party to the fraud of which she complains. She further alleges that defendants Allee have disposed of the property obtained from her, so that rescission cannot be had. She therefore prays that the note and mortgage in suit be declared null and void, that the same be cancelled, and for general equitable relief.

The defendant also filed a cross-petition, making George A. Allee, J. W. Allee, and C. F. Bates defendants thereto, in which is charged the fraud set forth in her answer, and participated in by them, resulting in her execution of the note and mortgage in question, and praying that whatever relief may be awarded plaintiff as against her may in turn be awarded in her favor as against said cross-petition defendants. The further contentions of the parties, and the facts in the case as far as material, will be found stated in the opinion. There was a decree finding that fraud had been practiced upon the defendant to her damage by the defendant in the cross-petition, and of which plaintiff had knowledge at the time he purchased the note and mortgage in question. It was accordingly ordered that defendant have a credit upon said note as for her damage in the sum of \$1,695.19; that plaintiff have judgment against her for \$504.81, the balance due on said note and a decree of foreclosure, with the costs thereof. The costs of the trial of this action are taxed to the cross-petition defendants. Plaintiff Brown, and the defendant Allee and Bates each appeal.—*Affirmed*.

Marion F. Stookey and Tom H. Milner for appellants.

C. W. Huffman and Harvey & Parrish for appellee.

VOL. 120 IOWA.—18.

BISHOP, C. J.—Upon being served with notice, and before answer, the cross-petition defendants, G. A. Allee, J. W. Allee, and C. F. Bates, filed motions for change in the place of trial. The Allees allege that they are residents of Benton county, and they pray a transfer of the action as to them to that county. Bates alleges that he is a resident of Linn county, and prays a transfer as to him to that county. These motions were overruled, and such rulings are made the basis of assignments of error. We think the motions were properly overruled. Section

3493 of the Code requires that an action for
I. CHANGE of venue. the foreclosure of a mortgage of real property shall be brought in the county in which the property to be affected is situated. By section 3574 of the Code it is provided that when a defendant has a cause of action affecting the subject-matter of the main action against a person not a party to the main action, he may file a cross-petition against such other person. The person thus made defendant in such cross-petition shall be notified as in other cases, and defense shall be made at the time and in the manner prescribed in respect of the original petition. The point here contended for as error was expressly made and decided in *Mahaska County Bank v. Crist*, 87 Iowa, 415. In that case it is said: "The statute contemplates a trial of the issues joined on the cross-petition in the court in which the original action is determined. It provides a means of adjudicating in a single action different rights of the defendants and others, which are affected by the subject-matter of the litigation which the plaintiff has instituted. The filing of a cross-petition and the proceedings thereunder do not constitute a separate action within the meaning of the statute, and to award a party a separate trial in the court of another county on the ground of his residence therein would be contrary to its spirit and intent."

II. In their several answers to the cross-petition the defendants Allee and Bates deny all the allegations charg-

ing fraud and misrepresentation. The record is a voluminous one, and we cannot undertake in this opinion to present even a synopsis of all the evidence bearing upon the question thus at issue. We content ourselves, therefore, with a statement of the ultimate facts and our conclusions drawn from a reading of the whole record. The exchange of properties was brought about through the medium of the defendant Bates, who is a real estate broker living at Cedar Rapids, Linn county. The defendant Allee had placed the Decatur county farm in his hands for sale or trade, and subsequently defendant Holden, in ignorance of such fact, employed him to negotiate a sale of her property. Bates soon notified her that he had a customer, and in a few days appeared at Fairview in company with defendant J. W. Allee. Upon the occasion of this visit the contract in question was drawn up and signed. As leading up to the making of the contract, Mrs. Holden says (and we are disposed to accept her version as being true) that Allee represented the farm as being situated just east of the town of Van Wert; that it was good black soil; that there was a fine spring thereon; that about all the land could be cultivated, there being ten or twelve acres that could not well be, or being seeded with timothy, need not be; that the farm rented for \$3 or \$3.50 per acre, and was of the value of \$40 per acre. Such statement concerning the value of the land might not be material under some circumstances. It is the general rule that one may express an opinion as to property values without incurring liability as for false representation. *Hoffman v. Wilhelm*, 68 Iowa, 510. But where the evidence discloses the fraudulent representation of a fact, and not merely an expression of opinion, the general rule does not apply. *King v. The Sioux City, etc. Co.*, 76 Iowa, 11. Here the representation of value is material to be considered, because, in connection therewith, it is shown that an attempt was made

2. EVIDENCE:
false representation.

by Allee to demonstrate that \$40 per acre was in fact the value of the land. He presented an abstract of title in proof of an assertion made by him that the property had been previously mortgaged to a loan company for \$2,200, and said: "This is proof that the land is worth what we ask for it, as you could not get a loan from any loan company for that amount if it was not worth double or more. One-third the value is what loan companies generally loan on real estate." To this statement Mrs. Holden replied that she did not understand abstracts, and thereupon requested Bates to look it over. The latter examined the instrument, and said to her: "Mrs. Holden, you don't have to look any farther. This is proof positive of the value." A subsequent examination of the abstract revealed the fact that another tract of land was included with the farm in question in the mortgage to the loan company. The evidence above referred to is also material as tending to throw light upon the attitude of defendant Bates in the transaction. That Mrs. Holden understood he was acting solely in her interest is beyond question, and that Allee was advised in this respect is not to be doubted.

After the execution of the contract, Mrs. Holden wrote to a person of prominence at Van Wert, inquiring generally as to the character and value of the lands lying east of the town, and received a favorable response. A few days later Bates wrote a letter to Mrs. Holden in which he congratulates her upon the deal; assures her that he has protected her interest to the last degree, and will continue to do so; gives her directions about going to see the farm, and urges her to go as soon as possible. Within a few days Mrs. Holden and J. W. Allee met and went down to see the farm. When the train reached Van Wert, Allee made some excuse for not getting off, and they went to Weldon, the next station. Here Allee procured a team and they drove to the farm four miles away. In this connection it is shown that the road from Weldon to the farm

passes through a fine farming country. On the other hand, the road from Van Wert to the farm is rough, and over steep bluffs. Upon reaching the farm, the buildings were inspected, as well as the land in the immediate vicinity thereof. Forty acres of the farm lies abutting upon the highway, the remaining eighty acres lying back to the north. Near the north line of the forty a ridge extends partially across, so that most of the eighty-acre tract is hidden from view, except from the summit of the ridge. Allee and Mrs. Holden drove out to about the center of the forty, and there he stopped the team. A heavy thunder storm was threatening at the time, and Allee said they had to hurry back to catch the train. He told her that the land in sight was the poorest part of the farm; that the eighty-acre tract, which they could not see on account of the ridge, was the better land and he would guarantee it. Mrs. Holden says that in view of the coming storm, the frightened team, and his statement of the necessity for haste, she told Allee that if he was sure the rest of the land was better than that forty she would go back. He assured her that of his own knowledge his statement was true, whereupon he turned the team and drove back. As they passed the house, Mrs. Holden expressed a desire to stop and inquire of the tenant what rent he was paying, to which Allee responded that they would miss their train if she did so; that he would give her the tenant's name and she could write to him. When asked for the name afterwards he had forgotten it. Upon reaching Cedar Rapids on her way home Mrs. Holden was met by Bates, to whom she told her experience, and that she doubted if the farm was worth as much as was being asked for it. He assured her that he would find out, and in a few days went to Fairview and assured her that he had made an investigation and that the farm was well worth \$40 per acre. Thereupon an invoice was made of the stock of goods, and the exchange effected, Mrs. Holden executing

the note and mortgage in suit as a part thereof. Bates received commission from Allee on account of the trade.

Now, it is made to clearly appear that the farm does not lie east of Van Wert, but in substantially the opposite direction; that the eighty-acre tract is very rough, with deep gullies and ravines; that to a considerable extent it is rocky and sandy, and unfit for cultivation; that the whole farm is not worth, at the best, more than \$2,700; and that for several years only a nominal sum had been realized in the way of rent, and this by taking a share in whatever crops were raised. After being advised of the true character and value of the farm, Mrs. Holden tendered back a deed thereof to the defendants Allee, and demanded a reconveyance of her property and a return of the note and mortgage here in suit, which was refused. The court below, as we think, rightly found that the exchange of properties was induced by fraud and false representations, in which the Allees and Bates participated; that in the transaction Mrs. Holden relied upon such false representations, and was deceived by such fraud to her damage. We have no need to lengthen this opinion by advancing argument in support of the conclusion thus reached.

III. It is pleaded in a separate count of the answer of the defendants Allee that, subsequent to all the matters hereinbefore referred to, Mrs. Holden commenced an action in equity against them in the district court of Jones county, in which action she alleged in her petition fully and particularly the fraud and false representations here complained of, and prayed for a rescission of the contract in question, and for general equitable relief. To such action the defendants Allee allege that they appeared by their attorney, Tom H. Milner, and fully answered. Further in this connection, they allege that such action was subsequently, and before trial, dismissed without prejudice by Mrs. Holden. Just what was intended by this

pleading we are at a loss to know. The facts of the pendency and dismissal of such former action are not pleaded as a bar to the cause of action herein set up in the cross-petition. There is no suggestion that the dismissal of such action was the result of any settlement, or that the same amounted in fact or in law to a settlement, or that by reason thereof Mrs. Holden is now in any manner estopped from asserting her right and cause of action as she has herein done. As to the defendants Allee, therefore, we need not give the matters so pleaded any farther consideration. The plaintiff, Brown, does not refer to such former action in his pleadings.

IV. The note and mortgage in suit are dated June 28, 1898, and by its terms the note is to become due on or before eighteen months after date. Upon the back of the

3. SALE of
mortgage:
bona fide
purchaser:
evidence.

note is an indorsement without date as follows: "Pay to S. H. Brown or order, without recourse. [Signed] Geo. A. Allee."

Upon the mortgage appears an assignment to plaintiff in proper form, bearing date July 3, 1899, and acknowledged on the same day before Tom H. Milner, notary public. In his reply filed the plaintiff affirms that he purchased said note and mortgage, paying full value therefor, and before maturity; that at the time thereof he had no knowledge or information concerning the matters of fraud and false representation, or other matter of infirmity, or of defense, now asserted by defendant Holden. That plaintiff is entitled to recover in this action according to the prayer of his petition, if it shall be found that the averments of his reply are true, cannot be the subject of a question. Conscious of the importance to him of the issue in which he is involved, we now proceed to a consideration thereof.

The record shows without serious contradiction the following additional facts: At the time of the transactions in controversy Brown lived at Belle Plaine, and, at the

time of the trial of this action lived at Clinton, this state. Milner and the Allees also lived at Belle Plaine. When the action to which reference has been made was brought in Jones county, Milner appeared as attorney for the Allees, and filed an answer. He was familiar, therefore, with the grounds of complaint being made by Mrs. Holden, the principal one of which was that the Decatur county farm was largely waste land, and had but little value. He says that he consulted with the Allees about the case, and saw the papers and documents, letters, etc., connected therewith. In the pleadings in the present case, drawn by him, it is charged that at the time the Jones county case was dismissed it was fully prepared for trial. In view of such facts, we are warranted in assuming that he had advised himself concerning the facts connected with the making of the contract, and in addition thereto, the actual facts concerning the farm and its true value. Such, at least, would be a natural and proper incident to the preparation of such a case for trial. Accordingly, he had then learned that a large portion of the farm was very rough, and of such a character as to be practically uncultivable; that in part it was stony and sandy, etc. He also was advised that the value of the farm was but little more than half the amount named in the exchange contract,—a fact concerning which there is now practically no dispute.

The circumstances attending the dismissal of the Jones county case may be properly alluded to in this connection. It seems that following some correspondence, Mrs. Holden went to Belle Plaine to see G. A. Allee. To him, while there, she stated that she was sick, and did not want to be engaged in litigation, and had come to see if there was not some way to avoid a trial. Some dispute exists in the record with reference to what occurred at this conference, but we think it is fairly made to appear that nothing more than an armistice was agreed upon; that Mrs. Holden was to

dismiss the pending suit, but without prejudice to her right to institute another for the same cause; that Allee was to keep the note and mortgage here in suit, and to forbear payment of interest thereon until March 1, 1900; that in the meantime every effort was to be made to dispose of the farm, and, if possible, realize enough therefrom so that out of the proceeds the matter in controversy as far as possible might be settled up. Whether Mr. Milner was fully advised as to the details connected with the conference is not made to appear. That he prepared the instrument intended to accomplish the dismissal of the suit—and this at the request of Allee—and that he took possession of such instrument after being signed by Mrs. Holden, and thereafter retained it, are facts established by the evidence of Mr. Milner himself. Therefrom he must have known at least that no settlement of the subject-matter of the action had been reached inasmuch as by the very terms of such instrument, drawn by him, it was provided that the dismissal was without prejudice, and that accordingly a new action affecting the validity of the note and mortgage might be instituted on the same or any day thereafter.

Coming to the purchase of the note and mortgage by plaintiff, it is the testimony of Mr. Milner that some time before July 3, 1899, the plaintiff, who was a near neighbor, came to him stating that he had some money to loan, and requested that a suitable customer be found therefor. Milner says, "I told him I would look around, and if I could see what I thought a number one good investment, I would make it and let them know." He then says that Allee came to him wanting to sell the Holden note and mortgage, following which Milner again saw Brown and recommended the purchase thereof as a good investment. He says he told Brown of the circumstances relating to the note and mortgage and received the reply, "All right, if you think this is good and safe, make the

investment." Brown does not appear as a witness. Accepting the statement of Mr. Milner that he told Brown the circumstances having relation to the note and mortgage, it follows that Brown knew, in point of fact, what Milner knew; that is, that Mrs. Holden had made an attack upon the instruments as having been procured by fraud and false representation; that such instruments were void for want of consideration, etc. He knew the grounds upon which such attack was based, and he knew that nothing stood in the way of the institution at any time of legal proceedings for the enforcement of the rights as claimed by her, including the cancellation of said note and mortgage. Whether Milner knew, and so communicated to Brown, the fact that in disposing of the note Allee was acting in bad faith towards Mrs. Holden, is, in our view, immaterial. So too, it is no answer to the proposition involved to say that neither Milner nor Brown expected or believed that Mrs. Holden would ever commence another action. They knew that she had the right so to do, and there is not pleaded as against her any estoppel, based upon an averment that she had by any means misled or deceived them or the Allees in the premises.

Such are the circumstances presented, and therefrom it is clear that Brown was doubly advised of the facts connected with the making of the note and mortgage and that Mrs. Holden claimed to have a defense thereto. In the transaction Milner was acting as the agent of Brown. As a matter of law what Milner knew Brown knew; as a matter of fact what Milner knew Brown knew. But one conclusion can be drawn from the record as it is presented. One who purchases negotiable paper, even for full value and before due, with knowledge that the maker thereof claims to have a defense which has not been waived or satisfied, does so at his peril, and the instrument will be subject to such defense or charge of infirmity in his hands. The proposition of law thus stated is too well settled to

require a citation of authorities, but see *Richards v. Monroe*, 85 Iowa, 359; *Payne v. Raubinek*, 82 Iowa, 587; 4 Am. & Eng. Ency. 302, and cases cited. And the rule is the same if the purchase be made through an agent to whom such notice or knowledge can be traced. In such cases the principal is chargeable with the notice to or knowledge possessed by his agent. *Merrill v. Packer*, 80 Iowa, 542; *Merrill v. Hole*, 85 Iowa, 66.

Submitted with the case were two motions, one to strike the abstract of appellants and one to strike the amendment to abstract filed by appellee. Both motions are overruled.

The decree of the court below was right, and it is **AFFIRMED**.

HULDA LEY, Appellee, v. THE METROPOLITAN LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

120	203
126	37

120	203
137	700

Insurance: FRAUD: INSTRUCTION. Where the defense to a suit on

1 an insurance policy is fraud, an instruction "that if the facts upon which the fraud is charged are or may be consistent with honesty and purity of purpose then the charge of fraud will fail" is not objectionable as confusing, or as doubtful whether the words "facts charged" refer to the facts as alleged or the evidence.

120	203
144	231

Same. In an action on a policy of insurance where fraud is

2 pleaded in defense, an instruction that "to show fraud the facts must lead naturally and clearly to the facts sought to be established, and must be inconsistent with any other reasonable or probable theory" is not erroneous, where the court in the same paragraph states that only a fair preponderance of the evidence is required to establish the defense.

Fraud: SUFFICIENCY OF PROOF. To avoid a policy of insurance on

3 the ground of fraudulent representations by assured, it is not only necessary to show fraud, but that the company was deceived thereby, and relying upon the truth of the representations issued the policy, and the proof must be clear.

Fraud: SUFFICIENCY OF PROOF: INSTRUCTION. In an action on an
4 insurance policy where the company pleads fraud in defense, it
is not only required to prove the making of the false representations,
but also that they were known to the assured to be false, and an instruction stating this rule is correct.

Evidence: EXCLUSION OF. Error in exclusion of evidence is cured
5 by the subsequent admission of same; and a party cannot
complain of the exclusion of evidence which his own objection
has assisted in keeping out of the record.

Evidence: GOOD FAITH OF ASSURED. In an action on an insurance
policy, where the company pleads fraudulent representations
of the assured in procuring the same, which, if known to the
applicant to be false would avoid the policy, the evidence is
considered and held sufficient to warrant the conclusion that
assured acted in good faith in making the representations.

Appeal from Des Moines District Court.—HON. W. S.
WITHROW, Judge.

SATURDAY, APRIL 11, 1908.

ACTION at law upon a policy of insurance issued by
defendant upon the life of plaintiff's husband. There
was a verdict and judgment for plaintiff, and defendant
appeals.—*Affirmed.*

Stutsman & Stutsman for appellant.

Power & Power for appellee.

WEAVER, J.—The policy in suit was issued May 29,
1900, upon the life of William Ley, who died August 19,
1900. The defendant refuses payment, alleging that the
said insured, in applying for such insurance, and in order
to obtain a favorable report or certificate from the medical
examiner, falsely and fraudulently misrepresented his
physical condition and history; that in the year 1896 said
Ley was afflicted with a very severe and almost fatal hem-
orrhage of the stomach (a disease which afterward caused
his death), and that, in his examination by and answers to
the examiner, he concealed and denied the fact of such

sickness, and that by such fraud and deception, in which it is alleged the plaintiff participated, said examiner was induced to certify the fitness of said Ley for insurance; and that such certificate would not have been made, nor would the policy have been issued, had such fraud not been practiced.

It was shown upon the trial that in applying for insurance the applicant signed written answers to questions propounded by the medical examiner bearing upon his physical condition at and prior to that date. Among such questions and answers were the following: "(1) Have you ever had spitting of blood? Ans. No. (2) Give full particulars of any illness you may have had since childhood, and name of medical attendants. Ans. Malaria, 8 years ago. Hawthorn Thornton, Portland, Oregon." "(6) Name and residence of your usual medical attendant. Ans. Have none. (7) Have you consulted any other physician? If so, when and for what? Ans. No." Although defendant took issue upon other answers made to the examiner, those above quoted are all which are material to the consideration of the matters presented in argument. The application, as distinct from the medical examination, is signed by both husband and wife, and, in addition to the usual assertion of the truth of all representations made and answers given, contains the following clause: "And it is expressly consented and stipulated that in any suit on the policy herein applied for, any physician who has attended, or may hereafter attend the insured, may disclose any information acquired by him in any wise affecting the declarations and warranties herein made."

Upon the trial the defendant conceded the issuance of the policy and the death of Ley, and assumed the burden of proof upon its allegations of fraud. In support of this issue, Dr. Stutsman was produced, and testified that he made the medical examination of Ley, and, while he had no independent recollection of many of the answers, was

able to testify that he recorded the answers as they were given by the applicant, and that, if Mr. Ley had disclosed the fact of having been afflicted with hemorrhage a few years before that date, he would have declined to certify him for insurance. On cross-examination the witness stated that he gave Mr. Ley a physical examination, sounded the lungs, listened to the heart action, tested the urine, and found no defects which would render him uninsurable. He appeared to be fairly well proportioned, and had an average appearance of a healthy man.

Dr. Little, a practicing physician, testified that he was called to attend Mr. Ley in 1896. The witness was then asked, "What was Mr. Ley suffering from, doctor?" To this plaintiff objected that the matter called for was confidential, and therefore inadmissible, under the statute; and the objection to this and certain other similar questions was sustained. It appears, however, that the witness, in answer to other questions, was permitted to testify, over plaintiff's objection, that Ley was vomiting black, clotted blood on the occasion referred to, and was quite weak and exhausted. He further testified that he attended Ley in his last sickness, and found him suffering from very profuse hemorrhage of the stomach. Plaintiff, in her own behalf, testified that upon the occasion of Dr. Little's visit in 1896 she caused him to be called in; that her husband had been taken ill while at his place of business, and walked home; that he vomited some, "but not so very much," and that there was no return of the vomiting after the doctor arrived; that the doctor was there only about ten minutes, and was in again once or twice only for a very brief call; that she was present on both occasions, and that the doctor said nothing to her husband as to the nature of the disease; that Mr. Ley returned to his work in two or three weeks, and thereafter was apparently in good condition, had good appetite, and seemed to increase in weight.

William Reese, who was Ley's business partner, testified that he was present in the room when the medical examination of Ley was made for the purpose of procuring this insurance, and heard more or less of the questions and answers, and that, in answer to the inquiry as to former sickness and treatment by physicians, Ley mentioned to the examiner the name of a physician in Oregon, and also said that Dr. Little had treated him. The foregoing is the substance of the testimony in the record, except that of certain expert witnesses, which need not be set out at this time.

Much of the appellant's argument is devoted to exceptions taken to the charge of the court to the jury. The length of the charge, and the number of the criticisms made thereon, are such that it is impracticable to set them out at length without unduly extending this opinion, and we shall therefore state them in substance only.

I. The rules given by the court in respect to evidence on which charges of fraud may be sustained are said by counsel to cast upon the appellant a heavier burden than the law contemplates. In support of this contention we are pointed to the following language extracted from the third instruction:

1. Fraud: instruction.

"Fraud will never be presumed, but must be proven by the party charging it; and if the facts upon which it is charged are, or may be, consistent with honesty and purity of intention, then the charge of fraud will fail. To show fraud, the facts must lead naturally and clearly to the facts sought to be established, and must be inconsistent with any other reasonable or probable theory."

The general proposition as to the presumption of good faith is conceded to be correct, but it is said, first, that the meaning of the first sentence is confusing, and leaves it doubtful whether the expression "facts upon which it is charged" has reference simply to the allegation of fraud in the pleading, or to the proof offered in support of such allegation; and, second, that the word "clearly," in the

next sentence, and the requirement that facts to prove fraud "must be inconsistent with any other reasonable or probable theory," call for a higher degree of proof than should have been exacted. The first sentence, in substance, is copied from an instruction approved by us in *Kenosha Stove Co. v. Shedd*, 82 Iowa, 540. We think it is not open to the objection made. No ordinary reader or juror would be apt to construe it otherwise than a statement of the general principle, often announced, that the presumption of good faith in human transactions is not overcome by proof of facts and circumstances which are consistent with honesty and integrity of purpose. *Hamilton v. Bishop*, 22 Iowa, 211; *Schofield v. Blind*, 33 Iowa, 175; *Pritchard v. Hopkins*, 52 Iowa, 120; *Lyman v. Cessford*, 15 Iowa, 232.

The second sentence quoted from the instruction is neither more nor less than a restatement in another form of the principle embodied in the first, and, as used by the court, we think the proposition is not erroneous. It is possible that the word "clearly," in that connection, if considered without reference to the charge as a whole, might be thought objectionable, as requiring proof beyond a doubt; and, if such were the effect here, the appellant's point would be well made. Such, however, would be an extreme and unfair interpretation of the court's meaning. The court was not instructing as to quantum of proof necessary to establish the defense pleaded, for that undoubtedly required only a fair preponderance of the evidence; and this, in express words, was so stated in another part of the same paragraph. But the alleged false statement in the application and examination of the insured person is not, strictly speaking, the defense offered, but is rather one of the facts which must be shown in support of the defense. To avoid the policy, it was necessary not only to show the fraud alleged, but that defendant was thereby deceived, and, in reliance

upon the truth of the representations, issued the policy which it seeks to avoid. To establish such evidentiary fact of bad faith, falsehood, or deception, it is held in a multitude of cases that the proof must be "clear," "satisfactory," "convincing." *Scofield v. Blind*, 33 Iowa, 175; *Prichard v. Hopkins*, 52 Iowa, 120; *Dirkson v. Knox*, 71 Iowa, 728; *Kellog v. Aherin*, 48 Iowa, 299; *N. Y. Ins. Co. v. Davis*, 96 Va. 737 (32 S. E. Rep. 475, 44 L. R. A. 305); *Paxton v. Boyce*, 1 Tex. 317; *Rabbit v. Dollen*, 14 Nev. 19; *McCarthy v. White*, 21 Cal. 495 (82 Am. Dec. 754); *Herring v. Wickham*, 29 Grat. 628 (26 Am. Rep. 405); *White v. Trotter*, 53 Am. Dec. 112; *Buck v. Sherman*, 2 Doug. 176; *Lavassar v. Washburne*, 50 Wis. 200 (6 N. W. Rep. 516); *Raymond v. Cox*, 44 N. J. Eq. 415 (15 Atl. Rep. 598). See, also, the rule stated and authorities cited in 14 Am. & Eng. Ency. Law (2d Ed.) 190. The distinction we have noted between the rule as to preponderance of evidence upon the ultimate issue and the rule as to the sufficiency of testimony to establish the fact of fraud has already been recognized by us in *Bisby v. Carskaddon*, 55 Iowa, 555. It is in the sense approved by the foregoing authorities that the district court must be understood in the paragraph under consideration, and the assignment of error thereon cannot be sustained.

II. Exception is also taken to paragraph six of the charge, in which the jury were instructed that:

"If it is shown by the fair preponderance of the evidence that, in his answer to any one or more of the interrogatories which are charged by the defendant as having been untruthfully answered, the applicant, William Ley, answered them, knowing at the time that the answer so given by him was false and untrue, or if he in making such answers, or any one of them, knowingly concealed any fact which he was in good faith at the time required to state, then the plain-

3. FRAUD:
sufficiency
of proof.

4. FRAUD:
sufficiency of
proof: in-
struction.

tiff cannot recover." It is said that this, in effect, requires the company not only to show that the answers of the applicant were untrue, but also to show that he knew them to be untrue, when, according to the correct rule, a good defense would be made by simply proving that the answers were false. What we might hold the law to be on this question if the issue here presented involved merely the truthfulness of answers or representations by the applicant in the nature of "warranties," we need not consider, and it is to such representations that the authority cited by appellant relates. *Sweeney v. Ins. Co.*, 19 R. I. 171 (36 Atl. Rep. 9, 38 L. R. A. 297, 61 Am. St. Rep. 751). We have in this state a statute which provides that the issuance of a certificate of health by the medical examiner estops the company from alleging or proving that the insured person was not in the condition of health required by the policy at the time the insurance was effected, unless the same was procured by or through the fraud or deceit of the assured. Code, section 1812. This serves to exclude the technical defenses which were formerly available, based on the doctrine of warranties as to the health and history of the insured person. To escape liability because of the uninsurable condition of the applicant's health or medical history, the insurer is required to show that the policy or health certificate was procured by fraud. It is a rule too well understood to require citation of authorities that the party alleging fraud must prove it. Now fraud has a well-defined meaning in law. For the purposes of this case, it may be said to be "a false representation of fact, with knowledge of its falsity, and with intent that it be acted upon, when the person to whom it is made acts upon it, and by so doing suffers an injury." 14 Am. & Eng. Ency. Law (2d Ed.) 21; *Watson v. Poulson*, 7 Eng. Law & Eq. 588; *Byard v. Holmes*, 34 N. J. Law, 296; *Avery v. Chapman*, 62 Iowa, 144; *Allison v. Jack*, 76 Iowa, 205. In *Brackett v. Griswold*, 112 N. Y. 467 (20 N. E. Rep. 376),

the definition is compressed into these words: "Representation, falsity, scienter, deception, injury." It follows, therefore, that proof of the falsity of the representation is proof of but one of several elements, each of which is essential to constitute fraud, and the burden is not removed from the party asserting it, until all are established by the evidence. If it be said that a representation may be made under such circumstances that, if false, we may safely conclude that its falsity was known to the party making it, the point can be conceded without affecting the rule as to the burden of proof. To establish its defense, it was incumbent on the defendant to prove not simply that the answers of the applicant were untrue, but that he knew them to be untrue, and thereby obtained the insurance. It is argued that, if the answers are found to be untrue, there is a presumption that the applicant knew it and intended to deceive. This, we think, is not the law. On the contrary, the law raises no presumption of knowledge on the part of the party making the representation from the mere fact that the representation is untrue. See note to *Cottrill v. Krum*, 18 Am. St. Rep. 560. The extent of the rule, so far as applicable to this case, is well stated in *Hammat v. Emerson*, 27 Me. 598, (46 Am. Dec. 602), cited by appellant, as follows: "When one has made a false representation, knowing it to be false, the law infers that he did so to deceive." In other words, there is no presumption of an intention to deceive from the mere fact that a statement made is not true; such presumption arising only when it appears that the statement is made with knowledge of its falsity. The giving of the sixth instruction was therefore not erroneous.

Objections are urged to other instructions on different grounds, the most material of which are governed by the conclusions already stated, or involve propositions of no general interest to the profession. We have examined each point made with the care which the importance of

the case merits, and find the law as stated by the district court to be in substantial accord with our prior holding, and such as was applicable to the issues and the evidence given on the trial.

III. Error is assigned upon the ruling of the trial court in sustaining the objections made to the testimony of Dr. Little concerning his treatment of Mr. Ley in 1896.

5. EVIDENCE: exclusion of. It will probably not be disputed that the testimony called for was privileged under the provisions of our statute (Code, section 4608); but it is said that by reason of the "waiver" contained in the application, and hereinbefore quoted, this prohibition does not apply. The question which is here sought to be raised is one of considerable importance, but the record before us does not seem to make necessary decision thereof at this time. While it is true that plaintiff's objection to the testimony of Dr. Little was at first sustained, the witness did later testify as to the professional visits made by him in the year 1896, and stated quite fully what he claimed to have discovered concerning the physical condition of Mr. Ley at that time, and as to the nature of the illness from which said insured was then suffering. Moreover, it further appears from the record that when plaintiff interrogated this same witness as to what occurred upon his visit to Ley in 1896, and especially as to what he (the physician) told Ley concerning the nature of his ailment, such testimony was excluded upon the appellant's objection. If there was any error in the first ruling, which we do not decide, it was cured by the testimony afterward admitted; and, in any event, appellant cannot complain of the exclusion of evidence which its own objection has assisted in keeping out of the record.

IV. Appellant further insists that the verdict and special findings returned by the jury have no sufficient support in the evidence. Without taking
 6. EVIDENCE: good faith of assured. the time or space to analyze the testimony,

we have to say that, in our judgment, the record does not justify us in disturbing the result below upon this ground. Unquestionably, there is evidence tending to show that in 1896 Mr. Ley had hemorrhage of the stomach, and that if such fact had been stated upon his medical examination the policy would not have been issued. On the other hand, there was evidence from which the jury would believe that Mr. Ley did not know or understand the nature of the attack, and that in making this answers to the questions put to him by the examiner he acted in good faith. It was not for the plaintiff to prove good faith in order to recover, for, in the absence of proof to the contrary, good faith is presumed; but it was for the defendant, in order to defeat recovery, to prove the alleged bad faith. The question whether the presumption in plaintiff's favor had been overcome, and the affirmative defense established, could not be arbitrarily disposed of by the court, but was properly left to the jury; and we cannot say that its verdict is so clearly the product of prejudice or passion that we should order a new trial.

We find no reversible error in the record, and the judgment of the district court is **AFFIRMED**.

JAMES COSTELLO v. DANIEL POMEROY, Appellant.

Daries: NUISANCE: ABATEMENT. The fact that township trustees contribute to the expense of constructing a drain to carry the water from the land of one onto that of another will not remove a liability for damage caused thereby; and a tile drain is not a permanent structure, the maintenance and use of which may not be enjoined at the suit of the party injured.

120	213
123	334
120	213
124	316
120	213
129	477
120	213
131	122

Appeal from Dallas District Court.—HON. A. W. WILKINSON, Judge.

SATURDAY, APRIL 11, 1903.

THE plaintiff is owner of the S. E. $\frac{1}{4}$ section 6, township 80, range 26, and the defendant is owner of the E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of the same section. There was a pond at about the center of the south line of defendant's land, covering about two acres of ground, including a portion of the highway, which run in an easterly and westerly direction. This rendered some three to five acres of defendant's land wet and unfit for cultivation, and nearly twenty acres of Royers' land, lying to the south. To the northeast, and about five rods east of the boundary line between the farms, and wholly included in that of plaintiff, is a pond covering a somewhat larger area, and a like one to the north flowing into it. The general drainage of all this land is northeasterly, and from the second pond mentioned is a ditch across plaintiff's land in that direction. In 1892, the defendant put in a six-inch tile drain from the pond first mentioned to the second one, and allowed Royers to connect therewith a four-inch drain extending seventy rods to the south, with collateral branches. Royers and the township trustees shared in the expense of the tiling placed by defendant. As a result, the first pond was dried up, and considerably more water thrown on plaintiff's land than had been before, to its appreciable damage. In this action, begun July 7, 1900, the plaintiff asked that the defendant be restrained from maintaining the drain, and discharging it on his land. The relief prayed was granted, and defendant directed to remove the tiling from plaintiff's land, and so close the drain at the boundary between the farms as to prevent the discharge of water therefrom. The defendant appeals.—*Affirmed.*

Cardell, Giddings & Winegar for appellant.

White & Clark for appellee.

LADD, J.—A careful reading of the record has convinced us that the construction of the drain increased the flow of

water upon plaintiff's land to his damage, and that his grantor did not assent thereto. The fact that township trustees shared in the expense could in no way relieve defendant from liability for running the drain from his land upon that of plaintiff. But the defendant pleaded that the drain was a permanent structure, and that all the damages to the land of plaintiff accrued at the time of its construction and before he acquired it. *Powers v. City of Council Bluffs*, 45 Iowa, 652; *Peden v. Ry. Co.*, 73 Iowa, 333; and similar decisions, are relied on. In the recent case of *Pettit v. Incorporated Town of Grand Junction*, 119 Iowa, 352, former decisions were reviewed, and a conclusion reached against extending their doctrine so as to include "structures not ordinarily regarded as permanent in location or character." It was also pointed out that the wrong in them considered did not consist in the creation of a nuisance where the party had no right to be, but in negligently making an improvement where he had a right to construct it. We do not regard the ordinary tile drain as of the permanent character contemplated in these cases. It may be readily removed, and for its continued efficiency repairing and cleaning may be required. This one was placed on plaintiff's land without right, and ought to be treated as a continuing, rather than a permanent nuisance.—AFFIRMED.

IN THE MATTER OF THE GUARDIANSHIP OF ELIZABETH O. CARTER, NOW ELIZABETH O. RUBY; M. M. CARTER, Guardian.

120 215
d124 156

Guardian and Ward: ALLOWANCE FOR SUPPORT: FRAUD AND COLLUSION. In general a parent is not entitled to an allowance from a ward's funds for its support, but where an allowance is made by the probate court on application, the same is presumed to be correct and will be sustained unless fraud is shown. Evidence in the case examined and held to show fraud and collusion between the parent and guardian.

Appeal from Keokuk District Court.—HON. A. R. DEWEY,
Judge.

SATURDAY, APRIL 11, 1903.

IN his final report to the lower court, M. M. Carter, as guardian of Elizabeth O. Carter, now Elizabeth O. Ruby, asked credit, among other items, for the amount paid to Icephene Knight, the mother of the ward, as compensation for the ward's support. To this report the ward filed objections, directed entirely to the allowance of this item, which objections were overruled, and the ward appeals. —*Reversed.*

D. W. Hamilton for appellant.

C. M. Brown and *J. P. Talley* for appellee.

McCLAIN, J.—The final report of the guardian was filed in January, 1901. In December, 1899, the mother, who, after the death of the ward's father, had intermarried with one Frank Knight, joined with him in making a claim against the ward's estate for \$350 for board and clothing furnished the ward during several years, which claim was approved by the guardian, and allowed by the probate court. As we understand the record, immediately after the allowance of the claim the amount thereof was paid to the mother of the ward, and the objection of the ward to the guardian's final report is predicated on the claim that this sum was improperly allowed and paid. But as the allowance was made by the probate court, and the objection to the final report was disallowed when it was interposed, and as there is some evidence that the allowance was reasonable and proper, we cannot interfere with the finding of the trial court, unless on the ground that the allowance was, as is alleged, made through fraud and collusion on the part of the guardian. While, in gen-

eral, a parent is not entitled to an allowance out of the ward's estate for the support of the child, yet there may be circumstances under which such an allowance is proper. *Welch v. Burris*, 29 Iowa, 186; *Gerdes v. Weiser*, 54 Iowa, 591. It is also true that application should be made to the probate court for an order before contracting any indebtedness for support. But, even though application is not made until after support has been furnished, if the claim therefor is reasonable and just, it may be allowed, and payment ordered. *Welch v. Burris*, *supra*; *Latham v. Myers*, 57 Iowa, 519. Where authority is not given before the expense is incurred, the propriety of it may be passed upon when allowance is asked. But the action of the probate court in making the allowance is presumed to be correct, and will be sustained, unless fraud is shown. *Latham v. Myers*, *supra*. The real question to be determined, then, is whether there was fraud and collusion on the part of the guardian in approving the claim when it was presented in December, 1900. The fact is clearly shown, however, by the evidence, that in 1896 a claim for \$800 was filed by the mother against the ward's estate for maintenance of the ward up to that time; that on demurrer to this claim, based on the ground that the court had no power to order an allowance for past support to the mother and her husband, who stood in *loco parentis* to the ward, the claim was disallowed; that the claim which is now in controversy was for the same period of time as to which the former claim was disallowed; that the guardian, notwithstanding the former disallowance, made no resistance to the present claim, but on the contrary, approved it, and that he failed to call the attention of the judge to the fact of such previous disallowance. It also appears that he had some pecuniary transaction with the husband of the ward's mother about the time of the allowance of this claim with reference to the sale to such husband of a tract of land, and that he

applied the money allowed as a payment from said husband to him thereon. We think the circumstances clearly show fraud and collusion on the part of the guardian in securing the allowance of this claim for his own personal advantage. The guardian testifies that he thought the first claim presented was too large, and that he consented to the allowance of the present claim because it was for a reasonable amount. But, if the first claim was too large, the proper objection would not have been by way of demurrer to the entire claim, but by objection to the allowance of more than a reasonable amount; and while, as already indicated, an allowance may, under exceptional circumstances, be made to a parent for past support of the ward, we think it was grossly unjust to the ward's estate, after the court had disallowed such a claim, as it might properly do in the exercise of its discretion, to secure its subsequent allowance, without at least calling the court's attention to its previous action. The guardian is not entitled to any particular consideration by reason of having paid out the money of the ward in pursuance of the order which was made in 1899, for that order was, as we have seen, induced by the guardian himself, and secured wholly on the basis of his approbation, and, as we hold, his act in securing such allowance was fraudulent and collusive.

The judgment of the lower court is REVERSED.

DEEMER, J., agrees to conclusion.

C. H. HOPWOOD, Appellant, v. FRED McCAUSLAND, Appellee.

Vendor and Purchaser: OPTIONS: ENFORCEMENT OF. Code, sections 4299-4301, providing contracts for the sale of or agreement to sell any interest in real estate shall not be forfeited unless written notice of intention to forfeit is served on the vendee, do not prevent the making and enforcement of options to purchase land.

120	218
120	562
122	459
120	218
124	226
120	218
127	193

120	218
134	563
120	218
138	485

Option Defined. An option for the purchase of real estate is
2 merely a right of election to purchase, which, when exercised,
becomes a contract.

Reformation of Contract: SPECIFIC PERFORMANCE. Equity will
3 reform a writing entered into under a mistake as to the legal
effect of the words used, and when such is the fact, specific
performance will be denied.

Specific Performance: ESTOPPEL. Defendant gave plaintiff an
4 option or contract to purchase land, agreeing that plaintiff
should notify him of his final conclusion in the matter.
Within the time agreed plaintiff's agent notified defendant
that he could not raise the money and that unless defendant
extended the time, which he refused to do, the option would
be abandoned. Thereafter defendant made valuable improve-
ments and leased the land for a term of years. *Held*, that
plaintiff's acts and conduct estopped him from enforcing
specific performance.

Appeal from Monona District Court.—HON. GEO. W.
WAKEFIELD, Judge.

SATURDAY, APRIL 11, 1903.

SUIT in equity for the specific performance of an
agreement to sell and convey real estate. Defendant
pleaded abandonment of the contract and an estoppel, and
also asked reformation of the contract on the ground of
mistake. The trial court dismissed plaintiff's petition,
and he appeals.—*Affirmed*.

Jepson & Jepson, T. F. Bevington and J. L. Kennedy
for appellant.

McMillan & Kindall for appellee.

DEEMER, J.—On the 7th day of September, 1898, the
parties entered into the following contract, which was
partly in writing and partly in print, to wit:

“That for and in consideration of \$13,920 dollars, pay-
able as follows: Fifty dollars cash, the receipt of which is

hereby acknowledged, nine hundred and fifty dollars October 7th, 1898, three thousand six hundred and forty dollars, March 1, 1899, nine thousand two hundred and eighty dollars March 1, 1904, at 7 per cent. interest from March 1, 1899, to be secured by first mortgage on real estate hereinafter described.

"The said Fred McCausland party of the first part has bargained and hereby sells and agrees to convey by warranty deed, on or before March 1, 1899, to the party of the second part or his assigns the farm of said party of the first part situated in Monona county state of Iowa, more particularly described as follows to wit: The east half of section thirty-three and the east half of the west half of section thirty-three, all in township eighty-five, range forty-five containing 480 acres, more or less according to government surveys, together with all and singular the appurtenances thereto belonging, and to deliver such conveyance as aforesaid together with abstract of title showing perfect title in said first party free from incumbrance except tax for 1898. And the first party further agrees for the same consideration to deliver full possession of said real estate to said second party or his assigns on or before March 1, 1899. It is hereby agreed that if the said second party fails to pay nine hundred and fifty dollars October 7th, 1898, as above stated this contract shall be null and void and terminate by limitation and the first party shall keep the said fifty dollars as a forfeiture and damages. Party of the second part to pay \$1.00 per acre for fall plowing done after this date."

This is claimed on the one side to be a contract for the sale of the land, and on the other as merely an option to purchase; and defendant also claims that if it is not, according to its terms, an option, it should be reformed so as to be construed as such, to meet what he alleges was the mutual intent of the parties. Fifty dollars was paid by plaintiff at the time the contract was made, but he

failed to make any other payments. On September 29, 1899, he tendered to defendant the amount due on the contract, and demanded a deed; and again, on March 14, 1900, he made a further written tender and demand of performance. Defendant served no notice on plaintiff of his intention to forfeit the contract, but claims that the contract was abandoned, and that, in any event, plaintiff is estopped by his acts, conduct, and declarations from enforcing the contract. There is a decided conflict in the evidence which can be explained on no other theory than that one of the parties is testifying falsely.

Section 4299 of the Code of Iowa provides, in substance, that a contract for the sale of real estate, providing for a forfeiture, shall not be forfeited or canceled

1. **OPTIONS:** unless a written notice of intention to forfeit,
enforcement
of. and the reasons therefor, is served upon the vendee under the contract; and section 4300 provides, in effect, that within thirty days from the service of such notice the vendee under the contract has the right to perform any of the conditions broken, and, if the conditions broken are so performed within thirty days, then the right to forfeit for defaults before the service of the notice, is terminated. Section 4031 provides that the two foregoing sections shall be operative in all cases where the intention of the parties, as gathered from the contract and surrounding circumstances, is to sell or to agree to sell an interest in real estate, "any contract or agreement of the parties to the contrary notwithstanding." There is nothing in these sections forbidding the making of options, and such options, when made, will be respected and enforced.

An option is not a sale. It is not even an agreement for a sale. At best, it is but a right of election in the party receiving the same to exercise a privilege, and only

2. **OPTION** when that privilege has been exercised by
defined, acceptance does it become a contract to sell.

Warvelle on Vendors (2d Ed.) section 125.

The contract which we have quoted is somewhat ambiguous, but there is no doubt in our minds that the parties understood when it was made, that it was a mere option—surely the defendant so understood it—although, by reason of its being partly in print and partly in writing, the words used may not have expressed this intent. In such a case a court of equity may well refuse to decree specific performance. *Waterman on Specific Performance*, section 152. After a careful examination of the record, we are convinced that all parties to the contract understood that it was to be a mere option, rather than a sale, and that the \$50 payment recited in the contract was paid for an option to purchase, but, owing to a mistake—perhaps of law—in the choice of terms, such option was not clearly expressed. Courts of equity in this state will reform contracts entered into under mistake as to the legal effect of the terms used. *Lee v. Percival*, 85 Iowa, 639, and cases cited. But whether this were true or not, such mistake, when clearly shown, is good ground for refusing specific performance of the contract. The relief asked in such a case is purely equitable, and when, under the circumstances disclosed, such relief would be manifestly unjust and inequitable to one or both of the parties, it will be denied. *Parsons v. Gilbert*, 45 Iowa, 36; *Rutland Co. v. Ripley*, 10 Wall. 339 (19 L. Ed. 955).

Plaintiff's conduct and declarations both prior and subsequent to the making of the agreement lend support to the conclusion that the contract was to be consummated on October 7, 1898, and that the \$50 payment was for a mere option. Aside from this, however, it was agreed—plaintiff being a nonresident of the state—that one Bird, an agent who had conducted the negotiations between the parties, should notify the defendant on or before October 7, 1898, of plaintiff's final conclusion in the matter. On or about October 1st of that

3. REFORMA-
TION of con-
tract: specific
performance.

4. SPECIFIC
performance:
estoppel.

year, Bird came to defendant, representing he had heard from plaintiff, and stated to him (defendant) that Hopwood was unable to raise the \$1,000 called for by the contract, and that, unless he (defendant) would give Hopwood an extension of time on the option, it would have to be abandoned. Defendant refused to grant the extension, and afterward, and on the 7th of October, rented the land, and proceeded to make improvements thereon amounting, in all, to something like \$1,200. Defendant saw Hopwood some time the following March, and a conversation was then had between them, the purport of which is in sharp dispute. Taking the whole of the testimony, we are satisfied that plaintiff, through his agent, notified defendant, in effect, that he could not comply with his contract, because plaintiff had not then been able to sell his Illinois land, from the proceeds of which he was to make the \$1,000 payment on the land, and that the optional contract or contract for the sale of the land was abandoned; that defendant, in view of the statements made to him by plaintiff and his agent, was justified in believing that plaintiff had abandoned it; and that, on the strength of such statements, defendant executed the lease and made the improvements on the farm hitherto mentioned. Under such circumstances, plaintiff is clearly estopped from insisting on specific performance of the contract. Had defendant attempted to collect the purchase price of the land, under the circumstances disclosed by this record, we apprehend there would be little doubt of his defeat. Mutuality of contract is essential to a valid decree for specific performance. This is hornbook law, and needs no fortification by authority.

The pith of this whole controversy lies in the fact that between the making of the contract and the attempt at its enforcement the land advanced in value about \$7.50 per acre. Had it decreased, instead of increased, we should not have been troubled with this case. We are satisfied

that when the contract was made, and the \$50 paid, both parties understood the agreement to be a mere option; that plaintiff, acting on this belief, and being unable to obtain the money with which to complete the \$1,000 payment, abandoned the matter, and not until after consulting with counsel, when he learned of the rapid increase of land values, did he attempt to enforce it; that this attempt was not made until more than a year after the original agreement was executed, which was after the defendant had leased the land for a long term of years, and made many and valuable improvements upon the land. So finding, the result is apparent.

The decree is right, and it is **AFFIRMED**.

**GEORGE PAUL V. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY, Appellant.**

Railroads: INJURY TO STOCK: DEFECTIVE CATTLE GUARDS: PROXI-

- 1 **MATE CAUSE.** On an issue as to whether plaintiff's colts were killed inside defendant's right of way, where they had gone owing to defective cattle guards, or on the crossing protected by the cattle guards, the evidence is considered and held sufficient to warrant the jury in finding that one of the colts was killed on or within the guards, notwithstanding the statement of the engineer that it was killed on the crossing.

Defective Cattle Guards: PROXIMATE CAUSE. Where a cattle

- 2 guard was so filled with snow and ice as to furnish no obstruction to stock and there was an inducement for plaintiff's colts to follow other horses which had passed over the defective guard, the question whether the failure of defendant to keep the guard in proper condition was the proximate cause of the accident, was for the jury.

Instruction: WITHDRAWAL OF EVIDENCE. In an action against a

- 3 railway company for killing colts claimed to have wandered onto the right of way over a defective cattle guard, an instruction withdrawing from the jury all questions of negligence in the operation of the train and directing them to give no consideration to evidence regarding the speed of the train

or ability of engine men to observe the crossing, was not misleading, as withdrawing evidence of the engineer as to what he actually saw at the time of the collision.

Cattle Guards: FAILURE TO KEEP IN REPAIR. Permitting a cattle guard to become filled with snow and ice so as to furnish no obstruction to the passage of stock is a failure "to maintain proper and sufficient cattle guards", within the meaning of sections 2023 and 2055 of the Code.

Appeal from Cedar Rapids Superior Court.—HON. J. H. ROTHROCK, Judge.

SATURDAY, APRIL 11, 1908.

ACTION for damages occasioned by a collision with two colts. Judgment as prayed, from which defendant appeals.
—*Affirmed.*

J. C. Cook and *H. Loomis* for appellant.

Rickel, Crocker & Tourtellot for appellee.

LADD, J.—At about six o'clock in the morning of February 7, 1900, the defendant's passenger train killed two of the plaintiff's colts. They were kept on the farm of his brother, from whose barn yard about fifty yards north of the railroad, was a lane to a field on the south side of the track over a private crossing. On each side of this were cattle guards about forty feet apart. The evidence was such as to warrant the jury in finding the defendant negligent in not keeping the west cattle guard in repair, and in allowing it to become so filled with snow and ice as to furnish no obstruction to the passage of the stock. The issue tried was whether the death of the colts was the proximate result of defendant's neglect to properly maintain this guard. The theory of the plaintiff was that the colts had passed over the guard into the right of way and were there

1. INJURY to stock: defective cattle guards: proximate cause.

VOL. 120 IOWA.—15.

killed, while the defendant urged that they were either struck on the crossing or when on the guard, or possibly one of them beyond it, where they had run in their fright upon the approach of the train. The cattle guard was at a level with the ground, but to the west was a gradual fill to a culvert, seventy-five feet distant, where it was six feet above the surface. One of the colts was found beyond this culvert, and, as to it, the evidence was such as to leave no doubt as to the conclusiveness of the jury's finding upon this count. The other colt was about three and one-half rods west of the cattle guard and some fifteen feet north of the track. The engineer testified: "There was a horse that came on the crossing the same time the engine did, and they collided. It came from the right-hand side. It came on a run, and there was just a flash on the light of the headlight that gives me a view of the right of way several hundred yards—there was just a flash, and I knew I had struck him and threw him into the wing of the west cattle guard. I was about midway between the cattle guards when struck. The cattle guards were up high, and I saw them plainly." Other evidence tended to show that he was mistaken in fixing the locality where the collision occurred. The snow was knocked off the west end of the guard, and a splinter freshly broken therefrom. Dice testified: "There was nothing, to show where they had been struck, only some tracks inside the guard, to show he had been inside, and there were some slivers on the cattle guard, and you could see the colt had been caught right in there. * * * Right where the first colt was caught it looked as if part of the footprints were right into the right of way just off the cattle guard, and it seemed as if his front foot was off and his hind foot inside the cattle guard, and it struck him so quick it probably knocked off the sliver from the cattle guard." Another witness said: "The snow was packed where the guard was splintered, and had been pushed away a foot or

where the horse had been struck." Had the colt been hit while on the crossing, it would seem that some indication thereof might have been found. In the absence of any such showing, this evidence of the condition of the guard, and the snow thereon, together with the place where the body was found, might have been accepted as being entitled to greater weight, in fixing the point of collision, than the testimony of the engineer. The difficulty of accurately observing the place from a train moving at the speed of forty miles an hour before daylight is apparent, and is illustrated by his failure to see the other colt, struck within a hundred feet from the first. As against the facts, if found as stated, the engineer's testimony ought not to be accepted as a verity.

II. The colt in all probability had become frightened by the approach of the train, and had run on the guard in front of it in an attempt to go on the right of way, and

appellant contends that it would have been as likely to have done so had the guard been in proper condition. The jury might have found

that, but for the guard being filled with ice and snow, the other colt, and a horse which jumped the fence, would not have been on the right of way, and that had they not been there, this colt would not have undertaken to follow. Stock are generally turned by cattle guards when properly maintained, and where, as here, the guard furnishes no obstruction, and there is an additional inducement to follow other horses which have passed because of its defective condition, it is for the jury to say whether the failure to properly maintain the guard is the proximate cause of the injury such as is complained of. See *Pothast v. C. & G. W. R. Co.*, 110 Iowa, 458. Appellant has evolved the theory that the other horses had run in immediately ahead of the train. One witness testified that the tracks of the animal which jumped over the fence indicated that it had stopped frequently, and another witness

2. DEFECTIVE
cattle guards:
proximate
cause.

noticed tracks to the culvert "along the side of the rails, and one between the rails. * * * At the culvert they were at the middle of the track. There were tracks of a horse that was running fast, as if frightened." Aside from this, there was nothing to indicate how long they had been on the right of way. From the fact that one had stopped frequently before escaping, and that the other one was struck when over the culvert, after running a distance not shown, the jury might have inferred they had passed over the guard some little time before the approach of the train, and at a time they would not have undertaken to cross had the guard been in repair and free from ice and snow.

III. What has already been said disposes of the alleged error in refusing the sixth instruction requested by defendant, to the effect that the animals "arrived at the crossing at about the same time the engine did, and that in their fright, or in attempting to escape from the engine, they ran upon or across the cattle guards in question, and were struck, while so doing, either upon the crossing or upon the guards, or after having crossed the guards in their fright," the plaintiff might not recover, and that the burden of proof was upon him to show that the collision did not so occur. Instead of this, the court charged the jury that: "It is claimed by the defendant that the colts of the plaintiff ran upon the crossing at about the same time that the engine arrived there, and that, in attempting to escape from the engine, they ran upon and crossed, or attempted to cross, the cattle guard, and were struck either while upon the guard or after having crossed the guard, in attempting to escape from the engine. If you find the evidence to sustain the contention of the defendant as above set forth, then your verdict will be for the defendant." This was more favorable to defendant than the law warranted, for, as seen, if one colt attempted to cross when it would not have done so but for the defective condition of the guard, the plaintiff was

entitled to recover. The contention that this and the fourth instruction casts the burden of proof on the defendant is not sound. Both are silent as to that matter.

The eleventh instruction is criticised in that the jury was told that the burden of proof to establish all the material allegations by the petition was on plaintiff, without pointing out what these were. That had been done in the third and fourth paragraphs of the charge, and repetition was unnecessary. Moreover, had defendant desired a more specific instruction, it should have been requested. The same remark disposes of the exception taken to the twelfth instruction.

IV. The jury was instructed that: "The question as to whether the defendant was negligent in the operation of its train at and approaching the crossing in question is ² INSTRUCTION: withdrawn from your consideration, and you withdrawal of evidence. will not, therefore, in arriving at your verdict, consider any evidence that may have been introduced as to the speed of the train or the ability of the engine men to observe the crossing as the train approached the same." Appellant insists this had the effect to withdraw the engineer's testimony as to seeing the colt run in front of the engine. The petition alleges that defendant did "so run and manage" the passenger train "that, by reason of the condition of said cattle guard, that same ran against the colts." And the manifest purpose of the instruction was to advise the jury not to consider the management of the train, or how far ahead engine men ought to be held to be able to see objects. It was admitted that no signal was sounded, and that the road to the east was straight and level. In these circumstances, we do not think the jury could have understood that the evidence of what the engineer actually did see was withdrawn, or any of the evidence bearing on the collision with the colts. Though the instruction is not as definite as could be desired, we are satisfied that the jury were not misled by it.

V. The corporation was bound, by section 2022 of the Code, to "make and keep in good repair" the cattle guard, and, under section 2055, "any corporation operating a railway, and failing to fence the same against live stock running at large and maintain proper and sufficient cattle guards at all points where the right to fence and maintain cattle guards exists shall be liable to the owner of any stock killed or injured by reason of want of such fence, or cattle guards for the full amount of the damages sustained by the owner on account thereof unless it was occasioned by his willful act or that of his agent, and to recover the same it shall only be necessary for him to prove the loss of or injury to his property."

4. CATTLE guards: failure to keep in repair. Appellant contends that permitting the guard to fill up with ice and snow, so as to obstruct the free passage of the stock, was not the "failing * * * to maintain proper and sufficient cattle guards" within the meaning of this section. This involves the assumption that the guard contemplated by the statute is the particular device made use of by the appellant. Any appliance which will keep animals from going upon the land adjoining the right of way, or from the latter on such land, satisfies the demands of the statute. *Missouri Pac. R. R. Co. v. Morrow*, 32 Kan. 217 (4 Pac. Rep. 87); *Missouri Pac. R. R. Co. v. Manson*, 31 Kan. 337, (2 Pac. Rep. 800). If carelessly allowed to become filled up with sand, as in *Pothast v. Ry. supra*, or with ice and snow as in this case, it is not a proper and sufficient guard, for it is not so maintained as to be adequate to turn stock. The abstract, without setting out the evidence, states that it warranted a finding that the defendant was negligent in this respect, and for this reason the care required in cleaning the guards in the winter season need not be considered. But see *Stacy v. Winona, etc. R. Co.* 42 Minn. 158 (43 N. W. Rep. 905); *Blias v. Minneapolis, etc., R. Co.*, 34 Minn. 57 (24

N. W. Rep. 558, 57 Am. Rep. 36); *Ind. etc., R. Co. v. Drum*, 21 Ill. App. 321. It is enough that the defendant was negligent in not maintaining the guard as the statute required.—AFFIRMED.

E. A. MILNER *et al.*, Appellants, v. M. J. DAVIS, Executor,
et al.

Will: ELECTION: SALE OF HOMESTEAD. Where the husband, who
1 is made the sole legatee and executor of the will of his deceased wife, completes a sale of her homestead pursuant to a contract made by the wife and the order of court, the same does not constitute an election to take under the will so as to preclude him from electing to take the proceeds of the sale and use the same in the purchase of a new homestead.

Homestead: DIVERSION OF PROCEEDS. The fact that a purchaser
2 of the homestead belonging to the wife under a contract of sale made by her, deposits a portion of the purchase price in a bank to the credit of the husband, who is sole legatee under her will, through an arrangement with the husband to complete the sale, does not constitute a diversion of the fund prior to settlement of the estate so as to deprive it of its homestead character.

Appeal from Pottawattamie District Court.—HON. O. D.
WHEELER, Judge.

SATURDAY, APRIL 11, 1903.

THE plaintiffs are the owners of a judgment against the defendant M. J. Davis, who was the husband of Margaret A. Davis, deceased, and is now the executor of her estate. Margaret A. Davis was for many years prior to her death the owner of ten acres of land, which was occupied by herself and her husband, M. J. Davis, as their homestead. Shortly before she died, she sold this land to Daniel E. Preston for \$850. She died, however, before a conveyance thereof was made to him. Mrs. Davis left a will, making her husband her sole legatee and the executor of her estate. Before the will was probated, M. J.

Davis entered into a written contract with Preston whereby he agreed to complete the sale made by his wife, by qualifying as executor, and by procuring an order from the court for the conveyance of the land to him. It was also agreed that the balance of the purchase price thereof should be deposited in a bank to the credit of Davis as such executor, to be paid over to him upon the delivery of a deed for the land. The deposit was made as agreed, and the deed executed and approved October 22, 1900. This action was commenced in July, 1900, to subject the money in the bank to the payment of the plaintiffs' judgment against M. J. Davis. On the 4th day of September following, Davis filed a written election to take a home stead right, rather than under the will of his deceased wife. There was a judgment denying the claim of the plaintiffs, and they appeal.—*Affirmed.*

Fremont Benjamin for appellants.

Turner & Cullison for appellee.

SHERWIN, J.—Two propositions are urged by the appellants: First, that there was an election by Davis to take under the will; and, second, that the deposit of the purchase money in the bank was a loan to the bank, and consequently a diversion of it to a use other than for the purchase of a new homestead. The election relied upon is the contract with Preston to complete the sale already made by Mrs. Davis, and the subsequent compliance with that agreement. The rule is firmly established that an election must be of record, and that it is sufficient if it discloses an act or declaration plainly indicating an intention to take under the will. *Craig v. Conover*, 80 Iowa, 358; *In re Estate of Franke*, 97 Iowa, 704; *In re Estate of Fractor*, 103 Iowa, 232. Before her death Mrs. Davis had sold this land to Preston, and a part of the purchase price had been paid to her, and her sick-

1. WILL: election: sale of homestead.

ness and death alone prevented the completion of the transaction. The defendant had agreed to this sale, and its purpose was, as stated by him, to secure a home in town. It was perfectly proper, then, for him to agree to complete it as soon as it could be done through legal channels, and we see nothing in the contract itself which even points towards an election on his part. He did nothing more than to agree to qualify as executor, and as such to procure the necessary order for a conveyance of the land according to the terms of the sale made by his wife. True, when he made the contract he had not been appointed by the court because the will had not then been probated, but the purchaser wanted immediate possession of the land, and the contract was so drawn that all interests would be fully protected in case of a failure on his part as executor to carry out its terms. Every act which he agreed to do was to be done as executor under the direction of the court, and every act which he did in closing the sale was so done.

The deposit of the money in the bank under this arrangement was not a diversion of the fund. Davis could not make a deed which would be accepted by the grantee until an order of court therefor could be obtained, and that could not be done until sometime in October following. All that could be done then was to make a deposit which would be paid to Davis as executor when he could furnish a deed, and until that time he had no right to or claim upon the money. Furthermore, his only right to the money was as executor. The estate had not been settled, and he certainly could not appropriate any part thereof to his individual use until the debts and the expenses of administration were paid. We think there had been no diversion of the money deposited by Preston when the defendant filed his formal election as herein stated. This disposes of the points argued, and the judgment is **AFFIRMED**.

2. Homestead:
diversion of
proceeds.

W. F. INSELL, Appellant, v. LAWRENCE KENNEDY, Appellee.

Continuance: RULING ON MOTION. The action of the trial court
1 in overruling a motion for a continuance based on want of
notice that the cause had been assigned for trial, where there
is a dispute regarding such notice, will not be disturbed.

Appeal: NOTICE: CONTINUANCE. Under Code, section 4560, where
2 an appeal from a judgment of a justice is not taken on the
day it is rendered, the cause will stand for a continuance at
the next term of the district court by operation of law, in the
absence of notice or waiver of the same.

Garnishment: COUNTERCLAIM: EVIDENCE. It is improper to per-
3 mit defendant on a counterclaim for wrongful garnishment
to testify that it is the practice of his employer to discharge
employees who suffer a garnishment of their wages, there being
no allegation of discharge and no showing that plaintiff knew
of this practice.

Wrongful Garnishment: INSTRUCTION. An instruction that if the
4 jury find that at the time of the commencement of the action
defendant was owing plaintiff less than \$5, then the suing out
of the writ of attachment was wrongful, is erroneous, as it is
the amount claimed and not the amount recovered that
governs the issuance of the writ, under Code, section 4579.

Appeal from Wright District Court.—HON. J. R. WHIT-
AKER, Judge.

SATURDAY, APRIL 11, 1903.

THE opinion states the case.—*Reversed.*

Porter Donly and *Filkins & Schaffter* for appellant.

McGrath & Bryan for appellee.

WEAVER, J.—Plaintiff began action before a justice of
the peace February 15, 1901, to recover from defendant the
sum of \$8.36 for board, and sued out a writ of attachment
on the allegation that defendant was a nonresident of the

state. Under this writ the Chicago & Northwestern Railway Company was garnished, and answered that it was indebted to defendant in the sum of \$56.65. On March 22, 1901, defendant appeared, denying the plaintiffs claim, and setting up a counterclaim on the attachment bond; alleging that the writ was sued out wrongfully and maliciously, and claiming damages for time lost in attending trial, \$12, attorney's fees, \$15, and exemplary damages in the further sum of \$68. He also pleaded a further counterclaim of \$5 for money loaned to plaintiff in the year 1892. There was trial to a jury, and on March 27, 1901, a verdict and judgment were found for plaintiff for \$6.36. Defendant on the following day appealed to the district court, at the next term of which there was trial to a jury, resulting in a verdict for the defendant for \$1.44. From judgment on this verdict, plaintiff appeals.

I. The first error assigned is upon the ruling of the trial court denying plaintiff's motion for a continuance. Ordinarily a ruling upon a motion for continuance will not
1. CONTINU-
ANCE: ruling
on motion. be held reversible error, save where there is a manifest abuse of the discretion reposed in the trial court. It is claimed, however, that the continuance here demanded was a matter of statutory right. Code section 4560, provides that, where an appeal is not taken on the day judgment is rendered by the justice, a written notice thereof must be served on the opposite party at least ten days before the next term of the district court, and, if such notice be not served, the action will be continued on motion of appellee. No notice was served in this case. The transcript was transmitted by the justice to the district court in due time, but was not entered by the clerk upon the appearance docket. The next term of the district court commenced April 22, 1901, and on April 26th the case was assigned for trial, but there is a dispute whether plaintiff or his counsel had notice of the order. On May 2d, before the case was called for trial, plaintiff

filed a motion setting up the foregoing facts, and asking a continuance, which was denied after a showing in resistance by the defendant. If the plaintiff was present, in person or by counsel, when the case was assigned for trial, and made no objection thereto, he would properly be held to have waived his right to demand a continuance; and, as there was a dispute on this point, we are not inclined to interfere with the order of the trial court overruling the motion.

We think it proper to say, however, that, there having been no notice of the appeal, we do not think the statute (Code, section 4560) required the plaintiff to file

2. **APPEAL:** any formal motion for continuance, or to
 notice: con-
 tinuance. make any appearance whatever in order to prevent the case being brought on for trial at the first term. In other words, without a notice the cause properly stands for continuance by operation of law, unless there be a waiver or voluntary appearance. *McCormick v. Bishop*, 8 G. Greene, 99; *Quillan v. Windsor*, 6 Iowa, 396; *Bond v. Davis*, 37 Iowa, 163.

II. The defendant was a witness in his own behalf, and after testifying that he was, and for some time had been, in the employ of the Chicago & Northwestern Railway Company, was permitted to testify, over

3. **GARNISH-**
 MENT: coun-
 terclaim: evi-
 dence. plaintiff's objections, that he was familiar with the rules and custom of said railway company, and that employees who allowed their wages to be garnished were liable to be dismissed from said employment. This testimony was, in substance, once or twice repeated, and error is assigned thereon. It should have been excluded. The defendant had alleged the garnishment to be malicious, and asked damages accordingly; and, if it was claimed that by reason of such garnishment he had in fact been dismissed from the company's service, it is possible the matters testified to would have been pertinent, especially if there was anything tending to show

that plaintiff knew of such regulation or practice, and brought the suit for the purpose of depriving defendant of employment. There is, however, no allegation of this kind, and, so far as shown, defendant still holds his position with the railway company. The evidence was therefore both immaterial and irrelevant. Other rulings upon the introduction of testimony are complained of, but we think them without merit.

III. Of the instructions excepted to, we will notice the sixth and tenth only. The sixth paragraph was in part as follows: "You are instructed that if you find from

4. WRONGFUL
garnishment:
instruction. the evidence at the time the plaintiff commenced this suit before the justice of the peace, which was on the 18th day of February, 1901, that the defendant was not owing the plaintiff any amount for board and lodging, or, if he was, the amount was less than \$5, then the suing out of said writ of attachment would be unlawful and wrongful, and the defendant would be entitled to recover of the plaintiff the actual damages resulting from the suing out of said writ of attachment." It will be observed that this proposition makes the attachment wrongful if the jury find that at the date of the writ defendant was owing plaintiff less than \$5. The statute (Code, section 4579) provides that in attachment proceedings in justice's court "the petition must be verified and claim more than five dollars and if a less sum is recovered the plaintiff shall pay all costs of the attachment." Under this provision, it is the amount of the "claim," and not the amount recovered, which is the test of the right to sue out the writ; and, if less than \$5 be recovered, the penalty is the payment of the costs thus occasioned. What may be the rule where a party, knowing that his just claim is less than \$5, demands a larger sum for the mere purpose of obtaining the writ, we need not undertake to decide, for that question is not presented by the instruction we are now reviewing. In our judgment, it cannot be said,

as a matter of law, that, because the jury find the actual indebtedness of defendant to be less than \$5, the attachment is therefore wrongful, and thus subject the plaintiff to general damages, in addition to the costs mentioned in section 4579. The tenth paragraph of the charge contains the same error to which we have just adverted, and we need not farther consider it. Further reference to the arguments of counsel is unnecessary, as what we have already said is decisive of the appeal.

The judgment of the district court is REVERSED.

THE STATE OF IOWA, Appellee, v. JEROME W. HOOT, Appellant

Assault With Intent to Commit Murder: WHEN SPECIAL INSTRUO-

1 TION NOT REQUIRED. On a prosecution for having sent a box containing explosives for another to open, with intent to commit murder, and the jury are told in various instructions that a finding that defendant was in fact the person who sent the box was essential to conviction, it is not necessary, in the absence of a request, to devote a special instruction to that subject.

Criminal Intent. A husband who sends a box containing explos-

2 ives to the home of his wife, but addressed to himself, with the expectation that she will receive and open the same and that her death will result, is guilty of assault with intent to commit murder, and the contention that it cannot be presumed that he contemplates that she will, without authority open the box, the same being addressed to himself and hence no basis on which to predicate a criminal intent, is without merit.

Same: EVIDENCE. In a prosecution for assault with intent to

3 commit murder, a specific intent to kill must be proven. Evidence in the case considered and held to show such intent.

Same. On a prosecution for assault with intent to commit

4 murder, the inquiry is "was the defendant inspired by a criminal purpose and intent to make an assault, and did he adopt and put into execution a plan designed to effectuate his purpose and intent" and it is immaterial that in the execution of his plan, acts were done unauthorized by the general laws relating to business affairs.

Included Offenses: INSTRUCTION: EVIDENCE. Where the facts in 5 a case are such that defendant must be guilty or not guilty of the offense charged, failure to instruct with respect to included offenses is not error. Evidence considered and held to show no included offense.

Appeal from Blackhawk District Court.—HON. A. S. BLAIR, Judge.

SATURDAY, APRIL 11, 1903.

THE indictment charges the defendant with an assault with intent to commit murder. He was tried, convicted and sentenced to the penitentiary for a term of ten years. From the judgment he appeals.—*Affirmed.*

C. E. Pickett for appellant.

C. A. Van Vleck, Assistant Attorney General, *S. B. Reed* and *Curtright & Arbuckle*, for the State.

BISHOP, C. J —Defendant and his wife, Nettie Hoot, were married in January, 1899. After living together about a week, they separated, and Mrs. Hoot returned to her home, at No. 337 Argyle street, in the city of Waterloo, this state. In May following, defendant returned to his wife at Waterloo, and together they started to make a trip down the Mississippi river, but it seems another disagreement arose, and within a few days Mrs. Hoot came back to her home in Waterloo. The defendant visited her there on August 10, remaining about an hour. He then went away, and did not return again. On October 30, 1899, a letter, addressed to the defendant at No. 337 Argyle street, Waterloo, was delivered by letter carrier to Mrs. Hoot, who opened and read the same. She testifies that previous to this she had frequently opened letters addressed to her husband, and which had been delivered at her residence, and had then forwarded the same to him, if important. The address upon the envelope, together

with the letter, were apparently written by a woman, and the letter read as follows: "Chicago, Oct. 22, 1899. Jerome, my dear: You will get all your presents to me by express today as I will return them. You know why. Goodby, Tab." The envelope is postmarked "Chicago, October 28, 1899." On the same day the letter was received, an express package was delivered to Mrs. Hoot, the same being addressed to defendant at the street and number mentioned. The handwriting of the address thereon was the same, apparently, as that of the letter previously received. Mrs. Hoot opened the package, and, on taking off the outside paper covering, found a polished box, on each end of which was a handle. Underneath one of such handles there was a drawer, and in it a small hole, evidently intended for use in pulling the drawer out. She put her finger in the hole, and pulled the drawer out a short distance, when there was a sharp explosion, followed by smoke emerging from the box. Such explosion was not sufficiently severe to do any damage, and immediately Mrs. Hoot called in an officer who took charge of the box. The next day the officer took the box to a safe location, placed it upon a pile of rock and exploded it by pulling the drawer out, a long cord attached thereto being used for the purpose. The explosion was a terrific one. The pile of rock was blown to fragments and scattered in every direction, and the air was filled with debris. No trace of the box could afterwards be found.

I. The box in question was sent by express from Chicago to Waterloo. Appellant complains that the trial court did not fairly and sufficiently instruct the jury upon the subject of the identity of the defendant as the person who sent such box. We have repeatedly held that it is the right of a defendant, charged with the commission of a crime, to have the jury properly instructed, and that every essential part

1. WHEN special instruction not required.

of the case should be covered by the instructions given. *State v. Brainard*, 25 Iowa, 572; *State v. O'Hagan*, 38 Iowa, 504. In the instructions given in this case there is no one that is devoted exclusively to the subject-matter upon which the complaint is based. But even a cursory reading of the instructions discloses that the jury was repeatedly told that a finding that the defendant was in fact the person who sent the box was essential to a conviction. The instructions are framed in clear, simple language, and we think no room was left for speculation or uncertainty. In our view, it was not possible for the jury to go astray upon the proposition of law involved. We do not say it would have been out of place to have devoted a special instruction to the subject indicated, but as defendant did not so request, and as the subject was otherwise fully covered, we do not think any necessity therefor existed. It cannot be said that the question of the identity of the defendant as the person who committed the alleged offense of itself involves such a matter of special defense as to call for special instructions. What we have said above, therefore, in no sense conflicts with any thing that is said in *State v. Brainard*, *supra*.

II. A further matter of complaint has relation to the legal status of defendant and his wife as of the time in question, and the failure of the trial court to instruct with reference thereto. It is the contention of counsel for appellant, if we correctly interpret his argument, that the facts presented are not sufficient to justify the indictment or warrant a conviction thereunder, and this for the reason that Mrs. Hoot, in receiving and opening the package, acted without right or authority, and, in consequence, was herself a wrongdoer. It is pointed out that the package was plainly addressed to defendant; that there is no evidence in the record tending to show that Mrs. Hoot had any

direct authority to act for or on behalf of her husband in such a matter; and our attention is called to numerous authorities holding that the marital relation, taken by itself, raises no presumption of the relation of principle and agent between husband and wife, and that the wife has absolutely no right to act for the husband, unless authorized so to do, certain matters pertaining to domestic affairs alone excepted. Such is not, in terms, the argument of counsel, but we take it that the conclusion sought to be drawn from the premises stated is that, there being no authority, express or implied, on the part of Mrs. Hoot to open the box in question, and the transmission thereof being in itself a legal act, there is accordingly no basis upon which to predicate criminal intent within the meaning of the law; and this for the reason that it cannot be presumed that defendant contemplated, much less intended, an unauthorized and unlawful interference with the package.

We may concede the premises, but we cannot yield our judgment to the conclusion. No question of abstract right or authority on the part of Mrs. Hoot is involved. The only question necessary or proper for our consideration in this connection is this: Assuming that defendant was the sender of the box in question, does the evidence in the record before us warrant a finding that it was within his contemplation that such box would be delivered to his wife, and that an attempt would be made on her part to open the same? In criminal law it is cardinal doctrine that every man is presumed to intend all the probable consequences of his wilful act. 2 Bishop on Criminal Law, section 665. If, therefore, the act done was followed by a result, probable in itself, and such result was within the contemplation of the defendant at the time the act was done, no other rational conclusion can be reached save that the result contemplated was the result intended. Now, it is manifest to us that the doctrines of the law of agency can

have no application to the case before us. This is a criminal proceeding, instituted on behalf of the public. Mrs. Hoot has no connection therewith save that, being the particular individual upon whom the assault is said to have been committed, she is a witness in the case. What were the relation between herself and her husband are material in one sense, and one only; that is, in determining the question of intent. If it was within the expectation of the defendant that his wife would receive and open the box, and that, as a result thereof, her death would probably result, the offense against the public would be complete. An unauthorized opening of the box, if such was intended, would support the indictment to all intents and purposes the same as an authorized opening. We conclude, therefore, that the contention of counsel in the respect indicated is without merit.

III. It is asserted by counsel for appellant that a specific intent, alleged and proven, is essential to the crime charged in the indictment, and that the evidence in this case wholly fails to disclose any such specific intent. We readily agree that a specific intent to kill, and with malice aforethought, is essential to the crime as charged in this indictment. *State v. Keasling*, 74 Iowa, 528. And it is undoubtedly the rule that, where it is sought to attach criminal responsibility to the commission of an act in itself indifferent, the intent necessary to give character to the act as a crime can never be implied; it must be proven and found. 3 (Greenleaf on Evidence, section 13; *Roberts v. People*, 19 Mich. 401; *People v. Sweeney*, 55 Mich. 586 (22 N. W. Rep. 50); *U. S. v. Buzzo*, 18 Wall. 125 (21 L. Ed. 812); 8 Am. & Eng. Ency. of Law, 287. Such an act becomes unlawful only when a specific intent to thereby accomplish crime is shown. It is manifest that mere proof of the act itself is insufficient for this purpose. Now, it is pointed out that the defendant had the lawful right to purchase dynamite,

3. SAME: evidence.

and to transport the same from one state to another, and in this we may agree. Therefrom, however, counsel argues that, having performed a lawful act only, and no specific intent to thereby accomplish a crime being shown, a conviction cannot be sustained.

Undoubtedly, counsel has correctly apprehended the rules of law, but his position is fatally weak in that the relevant evidence found in the record of the case is not confined to the mere fact of the sending of the box. There is the letter received by Mrs. Hoot in the morning, which the evidence tends to prove was written by the same person who wrote the address upon the box. It was known to defendant that Mrs. Hoot had been in the habit of opening his letters, and a jury would be warranted in finding that it was expected this one also would be opened by her. Counsel does not proceed to the point of contending that the letter was not sufficient to excite the interest of the woman, and to impel her to open the box upon its arrival. In our opinion, it was well calculated, to say the least, to incite the belief that the box contained articles that had been presented by her husband to some other woman, and were now for some reason being sent back. To open the box under such circumstances might well be found to be the result of a natural impulse.

The evidence warrants a further finding of facts as follows: That during October, 1899, defendant was staying in Omaha, Neb., and while there he procured to be made a box, identical in point of description with the one delivered in Waterloo; that about October 25, 1899, he left Omaha, and went to Des Moines, where he purchased five pounds of dynamite. From Des Moines he went to Chicago. He is identified by several witnesses as the person who sent the box in question by express to Waterloo. When apprehended, he was in New Orleans, living under an assumed name. The strained relations existing between defendant and his wife, together with the facts concerning

her ownership^h of property and the life insurance carried by her, bear directly upon the question of motive. Now, taking all these facts, and in reason it cannot be said there was an innocent shipment of a quantity of dynamite. To such purpose a handsome, highly polished box was not necessary; a secret device by means of which the inclosed dynamite would certainly be exploded upon the box being opened by unsuspecting hands was unusual to an ordinary shipment; the making of the box in Omaha, the purchase of the dynamite in Des Moines, and the going to Chicago to express the package to Waterloo; the letter which made an attempt to open the box reasonably certain upon its arrival; the subsequent conduct of defendant—all these are inconsistent in the extreme with any lawful purpose. We think a jury of reasonable men could draw therefrom but one conclusion—that it was intended the box should be opened by Mrs. Hoot, such opening to be attended by an explosion and her certain death.

IV. It is said by counsel for the appellant—and we think correctly—that to support a conviction, the record must show acts done by the defendant, “intended, adapted, approximating, and such as, in the ordinary
4. SAME. and likely course of things, would result in the commission of the particular crime.” Counsel further says that the case here made fails to meet the requirement of the rule. It is pointed out that the delivery of the box to Mrs. Hoot and the receipt thereof by her were unlawful acts, and not to be expected in the ordinary and likely course of things. And it is said that in order to sustain a conviction, we must assume that both the express company and Mrs. Hoot would perform unlawful acts. We can readily see that such conclusions may be drawn from the facts. But we are unable to see how the same can be material. Let it be admitted that the delivery by the express company and the receipt and opening of the box by Mrs. Hoot were unauthorized and unlawful acts, yet

such can avail defendant nothing. If the defendant sent the box expecting, and therefore intending, that such box would be received and opened by her, and that, as a result of such opening, a death-dealing explosion was likely to follow, he cannot escape conviction, because forsooth, in the matters of the unauthorized delivery and the unauthorized opening his expectations and intentions were met and fully realized. The presumptions that obtain in ordinary business transactions have no application, and this must be manifest. Was the defendant inspired by criminal purpose and intent to make an assault, and did he adopt and put into execution a plan designed to effectuate his purpose and intent? Such is the question with which we have to deal. If, upon the facts presented, it is to be answered in the affirmative, then it would amount to a travesty to say that the force thereof could be destroyed, and guilt be changed to innocence, by merely pointing out that in connection with one or more of the agencies employed acts were done which, although expected and intended, were yet unauthorized by the general laws having relation to the conduct of business affairs.

V. The jury was instructed upon the theory that the defendant was either guilty of the specific crime charged in the indictment, or not guilty of any. No reference is made to any of the included offenses. It may be conceded that a charge of assault with intent to commit murder includes assault with intent to commit manslaughter (*State v. White*, 45 Iowa, 325); also assault with intent to commit great bodily injury (*State v. Schele*, 52 Iowa, 608); also a simple assault (*State v. Jarvis*, 21 Iowa, 44). It is to be observed that the minor offenses referred to are simply included in the charge of the major offense. They are offenses of the same general class, but lower in order. By section 5407 of the Code it is provided that "the defendant may be found guilty of any offense the commission of which is necessar-

5. INCLUDED
offenses;
instruction.

ily included in that with which he is charged in the indictment." Under this section it has been held that where the offense charged is of such a nature that the defendant may properly be convicted of an offense necessarily included in that charge, it is the duty of the court to instruct the jury upon the subject of the included offenses, and a failure to do so will constitute error. But while this is so, it has frequently been held that the statute has no application to those cases where the facts are such that the defendant must be either guilty of the offense as charged, or not guilty. *State v. Sterrett*, 80 Iowa, 609; *State v. Cody*, 94 Iowa, 169; *State v. Beabout*, 100 Iowa, 155; *State v. Cater*, 100 Iowa, 501; *State v. Akin*, 94 Iowa, 50.

We have left therefore the inquiry whether under the circumstances of this case, the defendant could have properly been convicted of any offense less than that charged in the indictment. It seems to us there is room for but one conclusion. If defendant sent the box intending that it should be opened, he could have but one purpose in view, and that was to murder. If he did not send the box with such intent, he is guilty of no offense. The character of the contents of the box was such that an explosion meant certain death to one standing at the time over or near the same. Had an explosion actually followed the acts done by Mrs. Hoot, the offense, if any, would have been murder. Such being the facts, there is no more reason for taking into account included offenses than there would be in the case of one who deliberately puts a death-dealing poison into a cup for another to drink. In such cases there can be but the one purpose, and that is to produce death. If death result, there can be but the one crime, and that is murder. It follows from what we have said that there was no error in failing to instruct the jury upon the subject of included offenses.

We have now given consideration to all the matters concerning which complaint is made by counsel for appel-

lant in his argument, and we find no error. The defendant was given a fair trial, the facts disclosed by the record warrant his conviction and the severe sentence imposed, and the judgment is **AFFIRMED**.

LYDIA A. LUCKHART AND GERTRUDE M. LUCKHART, Appellees,
v. WILLIAM LUCKHART *et al.*, Appellants.

Express Trust: PAROL EVIDENCE. Parol evidence is not admissible to establish an express trust in land.

Deed: DELIVERY PRESUMED. A deed from father to son reciting a consideration and filed for record by the grantor will be presumed to have been delivered.

Trust in Land: WANT OF CONSIDERATION. Where a father conveys real estate to a son, reciting payment of consideration, those interested in the grantor's estate cannot establish a trust in the land, where there is no proof of fraud or mistake by showing that the deeds were in fact without consideration.

Resulting Trust: EVIDENCE. Evidence that a son to whom land was conveyed by the father in fact paid no consideration, never had possession except as tenant, that the father managed it, made improvements, rented it, caused it to be assessed to him, mortgaged it and had possession of the deeds at the time of his death, is insufficient to establish a resulting trust in favor of the heirs of the father, and parol evidence is not admissible in such a case to show want of consideration to defeat the beneficial use expressed in the deeds.

Subsequent Possession by Grantor. Where a father conveys land to his son, it will be presumed that his subsequent possession is in subordination to the title of the son, and not adverse, in the absence of a showing that he asserted a hostile title.

Appeal from Grundy District Court.—HON. F. C. PLATT,
Judge.

SATURDAY, APRIL 11, 1903.

SUIT in equity for the partition of certain real estate.
From a decree finding that one John Luckhart at the time

120	248
129	504
130	462
120	248
134	80
134	81
120	248
139	182
142	44

of his death was the owner of a certain three hundred and twenty acres of land in Grundy county, Iowa, which William Luckhart claimed to own, he (William Luckhart) appeals.—*Reversed*.

J. H. Scales for appellant.

Courtright & Arbuckle and *John S. Roberts* for appellees.

DEEMER, J.—The suit is to partition three hundred and twenty acres of land and five town lots, but the only controversy is over two quarter sections which appellant, William Luckhart, claims to own in virtue of conveyances thereof from John Luckhart, executed in August of the year 1877. John Luckhart, who at one time was the owner of this land, was the father of the defendants to this action, by his first marriage. His first wife died in the year 1876, and in June of the year 1879 he married the plaintiff Lydia Luckhart, by whom he had one child, Gertrude M., who with her mother, is also a plaintiff. The father, John Luckhart, died intestate January 19, 1899, and plaintiffs claim that they are entitled to a part of his estate, which included, among other things, the land in dispute. The record title to this land, as has been observed, is in defendant William Luckhart, under and by virtue of his deed executed in the year 1877. But plaintiffs claim that this deed was without consideration, was never delivered, was not intended to convey a beneficial interest, and that the grantee therein held the legal title in trust for John Luckhart. The deeds conveying the land to William contained covenants of general warranty, recited considerations, and, as they are of record, the presumption is that William is the owner of the land, and his claim thereto should be sustained, unless it be for some of the matter set forth by plaintiffs in their pleadings, and established by their proofs. These are (1) that the deeds were never

delivered: (2) that out of the circumstances surrounding the transactions a resulting trust arose in favor of the grantor or his heirs, which should be established and enforced.

Counsel for appellees frankly say that they have never claimed, and do not now contend, that there was an express trust in the land. But if they had, such contention

1. EXPRESS trust: parol evidence. would be without merit, for the reason that such a trust cannot be established by parol testimony. If they have shown that there was in fact no delivery of the deeds, then plaintiffs would be entitled to share in the land; but such claim distinctly negatives the idea of a trust, for defendant could not well have held the legal title in trust unless he acquired it in some manner. The deeds, as will be noticed, were from father to son. They recited valuable considerations, and the evidence shows that they were filed for record by the grantor.

2. DEED: delivery presumed. Under such circumstances, a delivery will be presumed. *Valter v. Blavka*, 195 Ill. 610 (63 N. E. Rep. 499); *Connard v. Colgan*, 55 Iowa, 538. Moreover, there is other direct testimony of an actual delivery to the grantee. Plaintiffs have not produced sufficient testimony to overcome this evidence, and we must find there was an actual delivery of the deeds. As they recited a consideration, and there is no proof of fraud or mistake, it is not permissible for plaintiffs to establish a trust by showing want of consideration therefor. This rule is settled by a long line of authorities. *Acker v. Priest*, 92 Iowa, 610; *Gregory v. Bowlsby*, 115 Iowa, 327, and cases cited.

Appellees rely, however, on evidence to the effect that it was not intended that the grantee should take a beneficial estate. There are some general statements in the opinions of this court to the effect that where a conveyance is made without consideration, and it appears from the circumstances that the grantee was not to take beneficially, a resulting trust arises. See *Williams v. Williams*, 108 Iowa, 91;

2. TRUST in land: want of consideration.

Dunn v. Zwilling Bros., 94 Iowa, 233. And there may be cases where this should be the rule. But generally speaking, a trust cannot be established by showing, as against a deed reciting a consideration, the receipt of which is acknowledged by the grantees, that there was in fact no consideration paid. See cases heretofore cited, and particularly *Aker v. Priest*. As the deeds ran directly from John Luckhart to his son William Luckhart, there is no room for the doctrine of resulting trust, growing out of the fact that John furnished the consideration for the land. He was the owner thereof, and made a transfer directly to his son; and, even if there was no valuable consideration, the transfer would be good as a gift or advancement based on love and affection, and no trust would arise. *Aker v. Priest*, *supra*, and cases cited. Because of such rules and presumptions, it is difficult, in any case of this kind, to establish a resulting trust. There is neither claim nor showing of any fraud perpetrated by William, nor is there any evidence that the conveyance was made for the purpose of defrauding the second wife.

It goes without saying that a pure resulting trust may be established by parol, but a trust depending upon an agreement of the parties cannot be so established. What, then, are the exact facts on which appellees
4. RESULTING trust: evidence. rely to establish a resulting trust. They are that William never paid any consideration for the land; that he never had possession of the land except as a tenant; that John, the grantor, managed the land for some time after the deeds were made, and until about the year 1886; certain declarations made by William regarding his possession of the property; that John Luckhart put improvements on the land, and rented part of it to a stranger or strangers; that for a time after the conveyance he caused the property to be assessed in his own name, and executed mortgages on part of it; that the deeds to the land were found with other papers belonging

to John Luckhart after his death. Do these facts establish a resulting or presumptive trust? We think not. Parol evidence is not admissible in such a case to show that there was no consideration for the deed, in order to defeat the beneficial use therein expressed. See cases heretofore cited, and *Salisbury v. Clarke*, 61 Vt. 453 (17 Atl. Rep. 135); *Hogan v. Jacques*, 19 N. J. Eq. 128 (97 Am. Dec. 64). Mr. Pomeroy, in the second edition of his work on Equity Jurisprudence at section 1035, thus states the rule: "If the doctrine [that contended for by appellees in this case] has any existence under the conveying system of this country, so that a trust should result to the grantor from the absence of a consideration, it can only be where the deed simply contains words of grant or transfer, and does not recite or imply any consideration, and does not, in the *habendum* clause or elsewhere, declare any use in favor of the grantee, and the conveyance is not in fact intended as a gift." Section 1036: "If, therefore, there is in fact no consideration, but the deed recites a pecuniary one, even merely nominal, as paid by the grantee, this statement raises a conclusive presumption of an intention that the grantee is to take the beneficial estate, and destroys the possibility of a trust resulting to the grantor; and no extrinsic evidence would be admissible to contradict the recital, and to show that there was in fact no consideration, except in a case of fraud or mistake." These rules are supported by a great number of authorities cited in the footnotes; and we have followed them in a number of cases, some of which have already been cited. See, also *Osborn v. Osborn*, 29 N. J. Eq. 385; *Squire v. Harder*, 1 Page, 494 (19 Am. Dec. 446); *Leman v. Whitely*, 4 Russ. 423. There is no claim of any fraud or mistake; hence the case must be determined with reference to the above rules.

There was then no presumptive or resulting trust, and, as an express one cannot be shown by parol, we have but

one question left, and this a claim that defendant's title is
5. SUBSEQUENT barred by the statute of limitations, and that
possession by grantor. John Luckhart acquired title to the lands by
adverse possession. Defendant's title does not seem to
have been challenged for such a time as to bar him from
asserting his deed, and the testimony is not sufficient to
establish the claim of adverse possession in John Luckhart.
He was presumptively in possession until the year 1886 in
subordination to the title of his grantee. *McClenahan v.*
Stevenson, 118 Iowa, 106. And there is no showing that
he ever asserted title in hostility to said grantee. If his
claim was as beneficial owner under a trust deed, his claim
would not be in hostility to the holder of the legal title,
but in accordance therewith; and the statute would not
begin to run until his grantor denied the trust, or the
grantor asserted not only beneficial ownership, but also
claimed the legal title in hostility to his trustee. See the
McClenahan Case, supra. The mere fact that John Luck-
hart remained in possession of the lands for a time after
the conveyance was executed, and made improvements on
the premises, does not of itself establish either a trust or
adverse possession. *Pillsbury v. Kistler*, 53 Minn. 123 (54
N. W. Rep. 1063).

So far we have discussed the case from appellees' standpoint. In support of the deed the defendant offered evidence showing that he gave his notes for part of the consideration of the land; that the deeds were actually delivered to him; that he paid these notes; that he took possession of the property, used and occupied it as his own; that he paid taxes on the premises; and other facts tending to support the conveyance. Appellees made defendant William Luckhart their witness, and elicited most of these facts. The conveyance attacked was made nearly thirty years ago. It has gone unassailed all this time, and plaintiffs are relying on loose and random conversations and conduct of the parties for many years to defeat this

aged and solemn deed. They should, under well-settled rules, make out a plain case in order to succeed. Such titles should not be easily disturbed. Safety in conveying and in land titles requires us to hold that the sanctity surrounding deeds of this character should be preserved, and that they should not be set aside except on the clearest and most satisfactory evidence. It may be that John Luckhart intended to defraud his second wife, but this is not claimed, and we therefore have no occasion to determine whether or not such was the fact.

Having carefully gone over the evidence, we are of opinion that the decree should be reversed, and the title to the lands in dispute quieted in the defendant William Luckhart. Such a decree may, at defendant's option, be entered in this court or the case may be remanded for a decree in harmony with this opinion.—REVERSED.

120	254
143	213

O. B. DICKINSON V. E. E. CROWELL AND LUCRETIA CROWELL,
Appellants.

Notice of Easement. A decree partitioning the interests of co-tenants and establishing in one a right of way over the land of the other constitutes constructive notice of such easement to a purchaser, though the deeds of the co-tenant and his grantees make no reference thereto.

Right of Way: DESIGNATION: ACQUIESCENCE. Where a right of way has been decreed over the lands of another, it is not necessary for the parties to expressly designate its location, but is sufficient if a right of way is used and acquiesced in. Evidence examined and held to show selection and acquiescence with sufficient definiteness.

Appeal from Buchanan District Court.—HON. FRANKLIN C. PLATT, Judge.

SATURDAY, APRIL 11, 1903.

IN 1870, Merrick, O. B., and A. D. Dickinson acquired the S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$, of section 5, township 89, range 9, in Buchanan county. Upon the death of Merrick Dickinson, the other two, his sons, inherited his share. In 1883 the partition thereof was left to arbitrators who found that O. B. Dickinson should have as his share the west one-half of said forty, including "the right of way to be given" by A. D. Dickinson and his assigns, forever, "from the highway on the east of said land through the land awarded to A. D. Dickinson"; that is, the east half of the forty acres. A decree was entered partitioning the land accordingly. Subsequently the parties united in a sale of south ten acres of the entire tract. In 1890 A. D. Dickinson conveyed his fifteen acres to Foreman, under whom, through mesne conveyances defendant Crowell claims. In none of these deeds is the right of way mentioned. Crowell fenced the land in 1900, and the plaintiff seeks in this action to have the said way established as against defendants, and to restrain them from interfering with him in its free use. The relief prayed was granted, and defendants appeal—*Affirmed*.

Cook & Leach for appellants.

Holman & French for appellee.

LADD, J.—The forty acres were for many years unfenced and uncultivated. The south ten acres was sold to Davis. The west half of the remainder now belongs to the plaintiff. Between it and the highway is the other half, which is the property of the defendants. That the plaintiff was awarded the right of way across the east fifteen acres in partition proceedings between himself and brother A. D. Dickinson in 1883 is not questioned. That decree stipulated "that said O. B. Dickinson shall take, have, and hold the west half of the southeast of the northeast quarter of section five (5), township eighty-nine (89), range

nine (9) west, and a right of way from the highway east of said southeast northeast to said premises, over and across the east half of southeast northeast of section five (5)." But no mention is made of this easement in the conveyance of A. D. Dickinson or others under which defendants hold title, and they had no personal knowledge until long after their purchase.

Were defendants charged with constructive notice of the easement awarded in this decree? As contended, there were no deeds from the one tenant in common to the other executed or recorded. The decree severed their interests, and set apart the portions to be held and enjoyed by each as definitely as could conveyances. The plaintiff was awarded (1) the west half, and (2) a right of way over the east half, by means of which to have access to it. The latter was not a lien on the property, as seems to be assumed by appellant, but "a service which one estate owes to another, or the right of doing something or having the privilege in one man's estate for the advantage and convenience of the owner of another estate." *Karmuller v. Krotz*, 18 Iowa, 352. It was an easement less than plaintiff's interest as a tenant in common, and yet derived through inheritance and the conveyance to the three Dickinsons. Being an easement, rather than a lien upon land, the statute did not require it to be noted in the lien index or index of all liens kept by the clerk. For this reason the cases cited by appellant are not in point. See *Barney v. McCarthy*, 15 Iowa, 510; *Thomas v. Desney*, 57 Iowa, 58; *Cummings v. Long*, 16 Iowa, 41. In all of these a stranger to the title was seeking to establish a lien, which must have been indexed to carry constructive notice. Here the defendant traces his title through plaintiff and the decree of partition. At one time the land belonged to the three Dickinsons in common, and, as defendants acquired their title through one of them, they were bound to inquire into the proceedings

1. Notice of
easement.

through which the one obtained the title which was formerly in three. In other words, defendants, in deraigning their title, must have looked to this decree as forming one of the muniments in the chain through which they claim. It is one of the indispensable links in tracing it back to the government. The rule generally prevails that, if a party cannot make out a title but by a deed or other instrument or record which leads him to the knowledge of another fact, he will be deemed to have knowledge of that fact. Says Mr. Washburn: "In regard to the extent to which a purchaser is bound by constructive notice, and what a purchaser by a subsequent deed is bound to know, the rule is that the law imputes to such purchaser a knowledge of all the facts relating to said land appearing at the time of his purchase upon the muniments of title which it was necessary for him to inspect in order to ascertain the sufficiency of such title. * * * What would be constructive notice in such cases may be said to be a knowledge by the purchaser of some facts which would put him upon inquiry, and require him to examine other matters that would generally unfold the true title." 3 Washburn Real Property (5th Ed.) pp. 347, 348. See, also, *Loring v. Grooner*, 110 Mo. 632 (19 S. W. Rep. 950). This decree could not have been read to ascertain the portion of the land awarded to A. D. Dickinson without discovering that a right of way across it was reserved therein to the plaintiff, and therefore of this fact the defendants are charged with knowledge.

II. Appellant insists, however, that the right of way has never been established, and, as more than ten years have elapsed since the right thereto accrued, this action is barred by the statute of limitations. Undoubtedly, A. D. Dickinson, as owner of the servient estate, might have laid out the right of way over his land in a manner best suiting his conveni-

2. RIGHT of
way: design-
ation: ac-
quiescence.

ence, provided he at the same time secured to the plaintiff the full enjoyment of his easement, and upon his refusal so to do the plaintiff could have exercised that power. Teideman on Easements, section 608. But there is no evidence of any such designations of the way. Nor do we think this was necessary. If they agreed upon its location or if a way was used and acquiesced in by both for so long a time that this should be treated as equivalent to an agreement, it is sufficient. *Karmuller v. Krotz*, 18 Iowa, 352; *Wynkoop v. Burger*, 12 Johns 222; *Tabbutt v. Grant*, 94 Me. 371 (47 Atl. Rep. 899); *Gardner v. Webster*, 64 N. H. 520 (15 Atl. Rep. 144).

A careful examination of the record has convinced us that a well-defined road, referred to by the witness as the "ridge road," passing through defendant's land a little north of the middle of the forty to that of plaintiff, has existed and been used since 1865, and that it was practically the only track through the timber which could be traveled at all seasons of the year. For thirteen years previous to the partition proceedings, and during several years subsequent thereto, it was the one mainly traveled by the Dickinsons in hauling out wood—the only purpose for which they entered upon the land. Near the south end was an irregular way, by which, when the ground was frozen or very dry, the neighbors often went over the land to that beyond, and at times plaintiff used it when he could reach the highway by going a shorter distance with his loads. Because of the swampy character of the ground, this was not ordinarily passable. There was also a track several rods north of the ridge road, which ran into it near the division line. And no doubt people generally drove over the land wherever they pleased, for it was never cultivated or fenced until purchased by the defendants. The particular road mentioned, however, was that ordinarily traveled by the Dickinsons, in using their wood lots both before and after the

decree of partition, and by plaintiff up to the time the land was fenced, and, in view of their situation and the condition of the land and the purposes for which held, it appears to have been as definitely selected and acquiesced in as the circumstances demanded. The plaintiff testified that he supposed "all the time that was the one," though defendants insist that he did not even know he was entitled to the easement. The evidence does not sustain this contention, though he admitted that he did not know, when talking with defendants in 1901, "whether any right of way had been established at any particular place on the land." As counsel have had some difficulty in settling this point, such admission ought not to be construed against one unlearned in the law. We are content in stating our conclusions without pretending to review the evidence in detail. It is not entirely satisfactory or free from doubt, but, in view of the character of the land and the manner of its use, the finding is certainly reasonable, and consistent with the weight of the evidence. That said disposes of the plea of abandonment.—AFFIRMED.

CITY COUNCIL OF MARION, Appellee, v. CEDAR RAPIDS & MARION RAILWAY COMPANY, Appellants.

Taxation: APPEAL FROM BOARD OF REVIEW: JURISDICTION OF DISTRICT COURT: BOND. Jurisdiction of the district court to review an assessment on appeal from a board of equalization is acquired by service of the notice of appeal, as provided by Code, section 1873, and failure to file a transcript of the proceedings before the board of review until the trial has begun will not oust the court of jurisdiction acquired by the appeal: nor is a bond required on such appeal.

Street Railway: MANNER OF ASSESSMENT. Code, section 1343, when properly construed, provides that a street railway is to be assessed as an organized money-earning whole, with proper allowance for its state of repair, and is not to be resolved into its component parts for separate listing and assessment.

120	259
122	231
120	259
128	146
120	259
132	625
120	259
138	718
138	719
138	720

Assessment of Street Railway: DIFFERENT DISTRICTS. Where a
 8 street railway extends into more than one taxing district, each district should assess its portion of the same on the basis of a fair and equitable valuation of the entire system.

Assessment of Franchise. The franchise of a street railway com-
 4 pany is not assessable, but the fact that the railroad is in successful operation may be taken into consideration in fixing its value.

Appeal from Linn District Court.—HON. H. M. REMLEY,
 Judge.

SATURDAY, APRIL 11, 1903.

THE opinion states the case.—*Affirmed.*

Chas. A. Clark & Son and Wm. G. Clark for appellant.

Voris & Haas for appellee.

WEAVER, J.—The appellant, having its principal place of business in Cedar Rapids, Iowa, owns and operates an electric street railway between the cities of Cedar Rapids and Marion; a part of its line and appurtenances being within the corporate limits of the latter city. By one of its officers, appellant listed that part of the property within the jurisdiction of Marion for taxation. By the plan adopted, instead of valuing the property in a single item, as a railroad, or fractional part of a railroad, it was listed as follows:

Track, etc.....	\$ 4,712 00
Total actual value of personal.....	3,652 00
“ “ “ “ real estate.....	2,848 00
“ “ “ “ all property.....	\$11,212 00
Net taxable “ “ “ “.....	2,803 00

The value \$4,712, placed on “track, etc.,” was based on a schedule itemizing the rails, bars, spikes, ties, frogs, poles, brackets, insulators, crossbars, and other materials entering into the construction of the road and trolley system, giving their estimated value, new (including

freight and labor), and diminishing the same from five to eighty per cent. for depreciation by wear and decay. The value, new, of the materials, with freight and labor, as thus shown, is \$11,180.69, and the depreciated value \$4,712. This estimate was accepted by the assessor and returned to the board of equalization, by which body the valuation of the appellant's property was increased by adding to the item "actual value of real estate" the sum of \$900, and to the item "track, etc." the sum of \$2,882. From this action of the board of equalization, the company appealed to the district court, where trial was had, and the appeal sustained as to the valuation of the item of real estate, but overruled as to the item of "track, etc.," the valuation of which by the board of review was confirmed. From this order both parties appeal. The railroad company, being the first to serve notice, is here designated as appellant.

L. Appellee raises an objection to the jurisdiction of the district court to try the appeal from the board of review, because of failure of the company to have a transcript of the proceedings of the board of review filed in said court. It appears from the abstract that this objection was made in the court below during the progress of the trial, and thereupon a continuance was had until the next day to enable appellant to supply such transcript, which was done, and the trial proceeded to judgment. Without a transcript before it, the court could not properly dispose of the merits of the case, and a dismissal of the appeal would of necessity follow. *Frost v. Board*, 114 Iowa, 103. And we have here to consider whether the filing pending the trial was sufficient to obviate this objection. The filing of the transcript is not a jurisdictional matter. Jurisdiction of the appeal by the district court is obtained by the service of a notice as prescribed by the statute. Code, section 1873. The notice being served, if the board of review neglect to send up the transcript it may result in a

1. APPEAL from board of review: jurisdiction of district court: bond.

dismissal of the appeal if the appellant neglect to obtain a proper order or rule requiring the performance of that duty by the board. Appellant may have been negligent in entering upon the trial without seeing that the transcript was on file, and, had the trial court refused to delay proceedings to allow the omission to be remedied, the party in default would have had no just ground of complaint; but, on the other hand, we cannot say that there was any abuse of discretion in permitting it. Nor do we think that the objection based upon the failure to file an appeal bond is well taken. The statute expressly provides that an appeal may be taken in proceedings of this kind "by a written notice to that effect to the chairman or presiding officer of the reviewing board, served as an original notice." There is nowhere any direction or suggestion requiring a bond, and the court has no power to impose any such condition where the statute does not authorize it.

II. Section 1343 of the Code undertakes to direct the manner of assessing waterworks, gasworks, electric light and power plants, and street railways—property which to

a. Street railway a large extent is located in public streets and manner of assessment. highways. It is there provided that "the lands, buildings, machinery, poles, wires, overhead construction, tracks, conduits, and fixtures belonging to individuals or corporations operating railways by cable or electricity * * * shall be listed and assessed in the assessment district where the same are situated. But where any such property except the capital stock is situated partly within and partly without the limits of a city or town, such portions of the plant shall be assessed separately and the portion within said city or town shall be assessed as above provided and the portion without said city or town shall be assessed in the district or districts in which it is situated."

This statute is construed by the appellant as requiring the assessor to list its property within his jurisdiction, not

as a street railway or fractional part of a street railway, but as so many rails, ties, poles, wire, and other items of material, as indicated by the schedule already referred to. Appellee, on the other hand, takes the position that the entire railway is to be considered as a unit of valuation, and assessed as a single, completed system, except where the line extends into another taxing district, in which case the portion situated in another jurisdiction is to be there assessed as a fractional part of the line or system to which it belongs. It is also the contention of the appellee that in fixing the valuation of the property the assessor may take into consideration the franchise under which the road is operated. A reading of the section in question reveals that it was apparently drawn with care to exclude the idea of making the franchise a distinct item of valuation in an assessment of such property for taxation. It makes specific reference to the physical property, and by implication, at least, limits the power of the assessor to its consideration. But this by no means necessitates the conclusion that the assessor is restricted to a valuation of a mass of worn and depreciated materials, without regard to the fact that they are associated and organized into a completed, valuable, going railway. It is incredible that the legislature intended to require a street railway company to pay taxes, not upon the fair value of its railway as such, but simply upon the basis of what the secondhand material of which its line is composed would be worth if the road were to be dismantled and the worn remnants placed upon the market. As already stated, this statute has special reference to a class of property located in the public streets, and it seems to have been thought necessary to describe it with considerable minuteness. Whether this was to prevent any attempt to tax the intangible property which we call "franchise," or to avoid any claim on the part of owners that such property partakes of the public character of the street, and is therefore untaxable, we need not

determine. Whatever may have been the occasion which inspired the provision, its effect is to declare that the entire physical property of the railway, except the public soil upon which it rests, shall bear its equal share of the burden of taxation. The thing to be taxed is an electric railway, or some specific portion thereof, and not the steel, iron, and wood which have been employed in its construction. True, the condition of these materials, whether new or old, sound or decayed, would be a proper matter to be looked into in fixing the value of the property; but it still remains the value of the organized whole—the thing, and not its ultimate component parts—which is to be assessed.

If the owner of a traction engine, when called upon for the assessment of his property, should demand that, instead of valuing it at what it is fairly worth as an engine, the assessor must consider it as if dissected into frame, boiler, cylinder, piston, wheels, shafts, rods, and bolts, with a depreciation of from one-half to three-fourths for age and wear, we think that it would not be unjust to characterize the demand as unreasonable, and the basis of valuation absurd. Is the proposition any less unreasonable when applied to a street railway? In such structure the materials have become the correlated and appropriate parts of a single, income-producing concern, having a value of its own by reason of its organization and use, which may be much more or much less than the original value of the materials entering into its construction. And this is true without any reference to the franchise, which is another and different consideration. It is to be admitted that, if the statute clearly provided for the basis of assessment for which the appellant contends, the courts would have no choice but to interpret it accordingly; but, when the language of an act is doubtful or ambiguous, that construction should be given it which most nearly conforms to reason and justice. The legislature will not be presumed to have intended that which is unreasonable or absurd.

9 Bacon's Abridgment, p. 238-256, "Statutes," subds. 1-10; *Farick v. Briggs*, 6 Page, 323; *Gibson v. Jenney*, 15 Mass. 205; *Neeven v. Smith*, 50 Mo. 525; *Kephart v. Bank*, 4 Mich. 602; *Parker v. Nothomb*, (Neb.) 93 N. W. Rep. 851.

To give the statute the construction desired by appellant, counsel quotes therefrom as follows: "The lands, buildings, machinery, poles, wires, overhead construction, tracks, and fixtures * * * *such* portions of said plant shall be assessed separately." By the use of the hiatus marked by asterisks in the quotation, the "portions" which are to be taxed separately are made to refer to the separate items first mentioned; but, by supplying the omitted words, we find the legislative declaration to be that, when the railroad property is situated partly within and partly without the limits of a city or town, "*such portions* of the said *plant* shall be assessed separately," and this we think is manifestly a very different proposition. The portions which are to be assessed separately are not the machinery, poles, wires, and other itemized elements in the construction of the road, but the portions or parts into which the railway property is divided by the boundary lines of the taxing districts through which it passes.

It is shown that one mile of the appellant's railway, or about one-sixth of the entire line, is within the limits of Marion; and, under the law as we have interpreted it, that city is entitled to have this part or portion of the property assessed at a fair and equitable valuation as a railway.

This does not necessarily mean an equal one-sixth of the entire railway property, for such an apportionment might often work an injustice to the owners or to the other taxing districts. On the other hand, it does not mean the value of this portion of the property would possess if wholly severed from the remainder of the railway of which it forms a part, or its value regarded as a mass of dead materials. It is rather such value as fair

3. ASSESSMENT
of street rail
way: differ-
ent district.

and reasonable men, having knowledge of such matters, would place upon this mile of road as an integral part of the system to which it is attached; taking into due consideration its cost of construction, state of repair, and capacity and efficiency for the purposes for which it was created.

As already intimated, we think that the value of the franchise held by the corporation—the right to occupy the streets—is not the subject of assessment under the statute as it exists; but we see no reason why the fact
 4. ASSESSMENT of franchise. that the railway is in successful operation, earning money for its owners, may not properly be considered by the assessor in estimating its value. All the evidence offered by the appellant upon the trial in the district court was directed to the one proposition—the value of the materials, freight, and labor in the construction of this portion of the road, and the depreciation in such value by reason of wear and decay. This, we hold, was an insufficient showing to justify the court in overruling the action of the board of review.

III. The order of the trial court restoring and confirming the assessor's valuation of certain real estate owned by the company in Marion has sufficient support in the record. The point made by counsel for appellee that this property should not have been separately assessed, but regarded as part of the railway for the purpose of taxation, is not involved in the issues before us. It was in fact separately assessed. The only question raised before the board of review was a question of values, and to that alone was the inquiry of the district court directed. There was no error in the order complained of.

The judgment of the district court is, upon both appeals, **AFFIRMED**

E. SCHMIDT, Appellant, v. MUSCATINE COUNTY.

Board of Health: DISINFECTION OF PROPERTY: LIABILITY OF COUNTY.

- 1 The compensation and expense incurred by one employed by a city board of health to disinfect the dwellings and contents of quarantined persons, who have been afflicted with contagious disease, is not a charge against the county, and there is no statutory authority for its payment by the county.

Same: DISINFECTING PEST HOUSE. A county is not liable for the cost

- 2 of disinfecting its pest house until after notice by the board. of health and opportunity to do the work itself.

Appeal from Muscatine District Court.—HON. W. F. BRANNAN, Judge.

SATURDAY, APRIL 11, 1903.

THE petition and first amendment thereto allege plaintiff's employment by the board of health of the city of Muscatine to disinfect "various houses and places where persons afflicted with smallpox had been kept or resided * * * at the expiration of the quarantine period, the said disinfecting being necessary for the protection of the public health before quarantined persons should be permitted to go at large;" that he had disinfected forty-nine houses, at the agreed compensation of \$10 each, and had made use of materials which cost \$75; that neither the persons for whom the services were rendered nor those legally responsible therefor were able to pay; that the houses were the homesteads of the parties occupying them; that the claim duly certified by the board of health had been presented to and rejected by the board of supervisors. The second amendment alleges employment "to disinfect certain houses" as before, and that eight additional houses, were disinfected, and that materials costing \$18 were made use of in so doing. In the third amendment to the peti-

tion he alleged further: "That under and by virtue of the contract of employment he had with the board of health of the city of Muscatine he was required, at the expiration of the quarantine period, and after the persons afflicted with smallpox had recovered and were entitled to be permitted again to go at large, except for the disinfecting, to disinfect all clothing and furniture used by the said persons, and which were in the apartment occupied by them when suffering from said smallpox; and in the disinfecting of the clothing, furniture, etc., of the said various persons whose names and places of residence are set out in the original petition as amended; and he states that the disinfecting of the personal effects in the rooms and houses occupied by such persons, as done and performed by him, served the double purpose of disinfecting the clothing and effects, and at the same time disinfecting the houses and buildings; and he states that the primary necessity for disinfection, so far as the protection of the public is concerned, is the freeing of the clothing of the persons who have been afflicted or exposed from the germs of said disease, for, if said clothing is not disinfected or destroyed, the persons going at large with said clothing containing said germs would be and constitute a menace to the public health, and, if said clothing had been destroyed, new clothing would have to be purchased at the expense of defendant, and the expense of the same would have amounted to thousands of dollars." To the petition as thus amended the defendant demurred on the ground, in substance, that the statutes do not authorize such services to be performed at the expense of the county. The demurrer was sustained, and as plaintiff elected to stand on the ruling, the petition was dismissed, and he has appealed to this court.—*Affirmed.*

Horan & Devitt for appellant.

Ed. P. Ingham and *J. R. Hanley* for appellee.

LADD, J.—The plaintiff's services were rendered in disinfecting houses with contents, in which persons afflicted with smallpox had resided or had been kept, at the expiration of the quarantine period, and before they were permitted to depart and mingle with the people. Were these, under the circumstances alleged, proper charges against the county? The statutes must answer this question. We find none requiring the county in any contingency to meet the expense of staying the spread of disease by cleansing the personal property or realty of individuals. Appellant seems to rely on sections 1040 and 1041 of the Code. See also, section 2570. The first of these relates solely to the care of the sick or infected individual by removal "to a separate house, if it can be done without injury to his health and by providing nurses and other assistance and supplies, which shall be charged to the person himself, his parents, or other persons liable for his support, if able; otherwise the county." Section 1041 provides that, in event removal would be dangerous to health, "the board shall make provision for him as directed in the preceding section, in the house in which he may be and in such case may cause the persons in the neighborhood to be removed, and take other means as may be deemed necessary for the safety of the inhabitants."

These sections, although somewhat differently worded, are of the same import as sections 21 and 22 of chapter 151, page 146, of the Eighteenth General Assembly. They relate primarily to the care of the sick or infected individuals, and by no reasonable construction can they be said to involve the cleansing of personal property or realty for the sole purpose of preventing or staying the spread of disease. The object in fixing responsibility for the expenses upon the county in event it cannot be otherwise collected is to secure to the indigent humane treatment

through isolation without hazarding the safety of the public. But that responsibility extends no further than to effect this object. With the recovery of the patient its liability ends. This much has been settled by our former decisions under sections 21 and 22, just mentioned. In *City of Clinton v. Clinton County*, 61 Iowa, 205, the supply of clothing to take the place of that burned was held the proper expense in the care of a patient, and it was said: "The sick person is properly chargeable with all the expenses which properly may be incurred under either section, including expenses of removal, if that is adopted, and the expense of isolation, if that is adopted." The case lends no support to appellant's contention. Had recovery been sought for the clothing burned, it would have been more in point. *Staples v. Plymouth County*, 62 Iowa, 364. In *Gill v. Appanoose Co.*, 68 Iowa, 20, the court, in referring to section 21, observed that: "It plainly provides that the county shall be liable only upon the conditions specified. Upon these conditions the county's liability depends, and it cannot be established until it is shown that the facts exist which are contemplated by the statute." *Tweedy v. Fremont Co.*, 99 Iowa, 721.

It was not the intention of the statutes to cast the burden of destroying the seeds of disease upon the unfortunate victim alone, but rather leave that for those directly benefited thereby, or the local municipality. If there be personalty or realty which ought not, in its present condition, to be used without renovation, can there be any doubt as to who should meet the expense necessary to render it available for use? The owner is primarily interested, and will be directly benefited. The situation may be due to no fault on his part. It certainly has not resulted from any wrong done by the county. It is incident to the ownership of property, and we can think of no reason for relieving the owner from his obligation to care for his own, and to so do as that it shall not become or

continue a menace to the health and welfare of the community. Evidently the legislature entertained this view concerning the obligations of private ownership in enacting section 1037 of the Code: "The board when satisfied upon due examination, that any cellar, room, tenement or building in said city, occupied as a dwelling house, has become by reason of the number of inhabitants or want of cleanliness or other cause, unfit for such habitation, and a cause of nuisance or sickness to the occupants thereof or to the public, may issue a notice to the occupants thereof or any of them, requiring the premises to be put into a proper condition as to cleanliness or health, or may require the occupants to remove from the premises within such time as the board deems reasonable. If the person so notified neglect or refuse to comply with the terms of the notice, the board may cause the premises to be properly cleaned at the expense of the owners of property, or the board may remove the occupants forcibly and close up the premises and the same shall not again be occupied as a dwelling place until put in a sanitary condition to the satisfaction of the board." Section 1044, in connection with other matters, enacts that cities under special charter "shall also have power to provide and shall provide for the assessment of all expenses incurred by said board and said cities, in consequence of the failure or neglect of any owner or occupant of the property to comply with any order of such board, upon the real estate upon which expenditures are made or expenses incurred, and it shall be a lien thereon from the time said work is done, and may be assessed, levied and collected as other special assessments, and may be collected and the lien enforced by civil action in any court of competent jurisdiction."

These are the only statutory provisions relating to the collection of such expenses. To them appellant interposes the objections (1) that they may not be established as a lien against a homestead; (2) that the special assessment

would be illegal because not according to the benefits accruing; and (3) it would be unjust to exact from the landlord costs occasioned by misfortunes of the tenants. To these the ready answers are: First, that the homestead is not made by the statute exempt from taxes and special assessments; second, the assessment is for an expense necessary to render the property available for use, and whether according to the benefits received would, in any event, be a matter of evidence; and, third, that, regardless of differences between the landlord and the tenant, the former is primarily responsible for the care of the property, and is the one who really derives the advantage of its renovation and preparation for future occupancy. But, even were these objections tenable, in the absence of any statutory provision; such expenses could not be incurred at the expense of the county.

II. Appellant insists, however, that the expense of disinfecting the county's pesthouse was a proper charge. This might have been true had the owner been first notified and given an opportunity to do the work. It is elementary that such statutes must be strictly pursued in order to charge the owner, and, as the board of health directed the house to be disinfected without notice or failure to comply therewith, no recovery can be had.—AFFIRMED.

MITCHELL VINCENT, Appellee, v. THE GERMAN INSURANCE COMPANY OF FREEPORT, ILLINOIS, Appellant.

Insurance: SETTING ASIDE AWARD: RECOVERY OF LOSS. A suit in

1 equity may be maintained to set aside an award of arbitrators of the amount of loss under a policy of insurance and to recover judgment for the loss.

Arbitration: UMPIRE: AWARD. Where an arbitration agreement

2 requires an umpire to act in case of disagreement and no difference appears, nonparticipation by the umpire will not invalidate the award.

Award: DELAY. Where arbitrators were appointed March 2d and 3 made their award July 28th of the same year, there is no such delay as will invalidate the award.

Award: MISTAKE OF JUDGMENT. Mistake of judgment on the part 4 of arbitrators will not invalidate an award unless so great as to indicate bias.

Notice of Arbitration: WAIVER. A party to an arbitration, who 5 notifies an arbitrator that he will not attend and refuses the request of the arbitrator to attend, waives his right to notice of time and place of meeting.

Arbitration: FAILURE TO TAKE EVIDENCE. Arbitrators who are 6 appointed to "ascertain and appraise" the value of, and loss upon the property, are not required to take evidence, and failure so to do will not invalidate the award.

Appeal from Monona District Court.—HON. GEO. W. WAKEFIELD, Judge.

SATURDAY, APRIL 11, 1903.

SUIT in equity to set aside an award made by appraisers selected by the parties to this suit to determine the amount of plaintiff's loss under a policy of insurance held by him in the defendant company upon a house in the town of Onawa; and to recover the amount of the loss actually sustained. The material issues will be stated in the body of the opinion. The case was tried to the court, resulting in a decree and judgment for plaintiff in the sum of \$626.60, and defendant appeals.—*Reversed.*

Sullivan & Sullivan and *J. W. Anderson* for appellant.

Mackenzie & Ryan and *C. E. Underhill* for appellee.

DEEMER, J.—A great many questions are argued which do not seem to be material, or, if material, are not properly presented. The policy was issued June 18, 1897, and the fire occurred November 6, 1897; resulting in a partial destruction of the premises insured. The policy provided,

VOL. 120 IOWA.—18.

among other things, that "it is expressly agreed that the amount of any loss or damage sustained by the assured to any of the property hereby insured, shall, at the written request of either party, made prior to the time when said loss or damage shall become due and payable under the terms of the contract, be submitted to three disinterested and impartial appraisers, to be selected, one by the assured and one by the company and a third by the two already provided for, the award or appraisal of any two of whom, in writing and under oath, shall be binding on the assured and this company as to the amount of loss or damage only, and shall not decide the liability of this company under this policy, nor be deemed a waiver by this company of its right to contest in the courts its legal liability for any cause to pay the amount so appraised; and such written request shall designate a time and place for holding such appraisal and for selecting such appraisers. No suit against the company for the recovery of any claim or loss under this policy shall be sustainable in any court of law or chancery until an award shall have been made, showing the amount of loss, when either party have demanded as aforesaid an appraisal; and said appraisal and award shall be a condition precedent to any liability whatever upon the part of this company."

After the loss occurred an adjuster visited the premises and attempted to adjust the loss, but was unable to do so. He thereupon, and on the 10th day of February, 1898, gave notice that he should rely on the arbitration clause of the policy, named an arbitrator, and fixed the date when the parties should meet to arbitrate as February 21, 1898. Plaintiff responded to this, requesting a postponement until February 28th, or later, and asked the company to prepare a stipulation for arbitration. On the 2d day of March, the parties met and signed an arbitration agreement, which, among other things, provided "that John H. Harte and B. H. Freeland shall appraise and ascertain the

sound value of, and the loss upon, the property damaged and destroyed by fire of November 7th, 1897, as specified below." "Provided that the said appraisers shall first select a competent and disinterested umpire who shall act with them in matters of difference only. The award of two of them, made in writing in accordance with the agreement, shall be binding upon both parties to this agreement as to the amount of such loss. It is expressly understood that this agreement and appraisal is for the purpose of ascertaining and fixing the amount of sound value and loss and damage only to the property hereinafter described and shall not determine, waive or invalidate any other right or rights of either party to this agreement. The property on which the sound value and the loss are to be determined is as follows, to wit: The one and one-half story frame dwelling house situated on the northwest corner of block seventy-two in Onawa, Iowa. It is further expressly understood and agreed that in determining the sound value and the loss and damage upon the property, hereinbefore mentioned, the said appraisers are to make an estimate of the actual cost of replacing or repairing the same, or the actual cash value thereof, at and immediately preceding the time of the fire, and in case of depreciation of the property from use, age, condition, location or otherwise, a proper deduction shall be made therefor."

It was afterward discovered that Freeland, who had been named by plaintiff, was a relative; and on the 8d of March plaintiff wrote, requesting that one Messing be substituted in place of Freeland. On the 28th day of July the appraisers met, and duly subscribed to an oath to perform their duties as such. They also appointed one Clarke, of Sioux City, Iowa, an umpire, and on the 29th day of July, after inspecting the property, made the following award: "To the Parties in Interest: We have carefully examined the premises and remains of the prop-

erty hereinbefore specified, in accordance with the foregoing appointment, and have determined the sound value to be twelve hundred dollars and the loss and damage to be two hundred seventy dollars and thirty-six cents. Witness our hands this 29th day of July, 1898. John H. Harte. Gotlieb Messing." There seem to have been no differences between these arbitrators or appraisers, and they did not call upon the umpire, Clarke. Indeed, Clarke never left his home, at Sioux City. Plaintiff was not content with the award and commenced action against the company February 11, 1899, by serving notice upon the Auditor of State, under statutes providing for such service. The original petition was filed April 5, 1899, but the amended and substituted one, on which the case was tried, was not filed until October 16, 1899. On June 6, 1901, and after the cause had been submitted to the court, an amended reply was filed, which attacked the arbitration because no notice was given plaintiff thereof. A motion was made to strike this reply, which was overruled; but, as defendant assigns no error on the ruling, this order cannot be reviewed.

Much is said in argument with reference to rulings of the court in transferring and in refusing to transfer the case from one docket to the other; but as no exceptions were taken to these rulings, and no errors are assigned thereon, these matters cannot be considered. The case was tried as in equity, and will be treated here as an equity cause.

Before the case was tried, defendant offered to confess judgment for the amount of the award, with costs to date of offer, but this was refused. It is contended that no action would lie until the award or appraisal had been set aside. This is a suit to set it aside, and to recover judgment for the amount of the loss. In view of the record presented to the trial court, it had the right not only to pass upon the

1. SETTING
aside award:
recovery for
loss.

validity of the award, but, in the event it concluded to set it aside, to render judgment for the amount of the loss under the policy. Further, it is argued that defendant was entitled to a jury trial to determine the amount of the loss. This question is not properly presented, for the reason that the cause was transferred to the equity docket on motion of the plaintiff, and defendant took no exception to the ruling.

Next it is contended that the court erred in setting aside the appraisal or award, and this contention presents the controlling point in the case. Plaintiff says that the award was invalid for many reasons, but the following are the only ones which have any support in the evidence; (1) because Clarke was not notified of the hearing, and did not participate in the award; (2) for unreasonable delay in making the award; (3) for mistake and misconduct of the arbitrators; (4) because the arbitrators did not give plaintiff notice of the time and place where they should meet; (5) because the allowance made by the arbitrators was unreasonable and inadequate.

There is no merit in the first contention, for the reason that, according to the terms of the arbitration agreement, the umpire was not required to act unless there was some dispute between the other two. *Keans v. Rankin*, 2 Bibb, 88; *Enright v. Ins. Co.* (Sup) 15 N. Y. Supp. 893.

As to the second, there was no such delay as will
2. ARBITRATION: umpire: award. avoid the award. *Nichols v. Insurance Company*, 22 Wend. 125.

The fifth ground is not supported by the evidence. While we might not be able to agree with the appraisers in the amount found by them, there is no such inadequacy in itself as to justify us in disturbing their findings.

Mistake of judgment on the part of the arbitrators is not ground for setting aside an award, unless such mistake be so great as to indicate *partisan bias*. *Thornton v.*

McCormick, 75 Iowa, 285; *Burchell v. Marsh*, 17 How. 350 (15 L. Ed. 96); *Robbins v. Clark*, 129 Mass. 145; *New York Lumber Co. v. Schnieder*, 119 N. Y. 475 (24 N. E. Rep. 4); *Michels v. Ins. Co.*, 129 Mich. 47 (89 N. W. Rep. 56). If this were not the rule, arbitration would be a useless ceremony, for we rarely find parties content with the award. In order to justify a court in setting aside an award, the misconduct or other ground of impeachment must be made out by clear and satisfactory evidence. *Tomlinson v. Hammond*, 8 Iowa, 40; *Thompson v. Blanchard*, 2 Iowa, 44; *Mosness v. German Ins. Co.*, 50 Minn. 341 (52 N. W. Rep. 932). Every reasonable presumption will be indulged in favor of the award.

With reference to failure to give notice, plaintiff has shown that no notice was given him, but it is undisputed that he told the appraiser appointed by him that he would not attend; that he did not want anything to do with it. This arbitrator also testified that he asked plaintiff to attend the arbitration, but that plaintiff refused to do so. This clearly amounted to a waiver of notice, and authorized the arbitrators to proceed without plaintiff's presence. *Cogswell v. Cameron*, 136 Mass. 518; *Fudickar v. Ins. Co.*, 62 N. Y. 392.

We have left but one question, and that the alleged mistake and misconduct of the arbiters. Claim is made that they refused to hear evidence. It is true that they did not take testimony, but they were not selected for that purpose. They were to ascertain and appraise "the sound value of, and the loss upon, the property damaged." To appraise is to estimate value, and we have no doubt that these arbitrators or appraisers were selected to make an appraisement, and not to hear evidence. The men selected by the parties were experienced contractors and builders, and the terms of the contract clearly indicate that an appraisal, only, was contemplated. That such an agreement is good, and that no

4. AWARD: mistake of judgment.

5. NOTICE of arbitration: waiver.

6. ARBITRATION: failure to take evidence.

notice to the parties is required in such cases, see *James v. Schroeder*, 61 Mich. 28 (27 N. W. Rep. 850); *Cobb v. Dolphin Mfg. Co.*, 108 N. Y. 463 (15 N. E. Rep. 488). We are not to be understood as holding that such arbitrators may not take evidence. All that we now decide is that their failure to do so under such a state of facts as are here presented will not avoid the award. The testimony leaves no doubt in our minds that neither party expected or intended to introduce evidence before the arbitrators. This simply adds strength to our conclusions regarding the proper construction of the agreement for arbitration or appraisal. See, also, *Canfield v. Watertown Co.*, 55 Wis. 419 (13 N. W. Rep. 252); *Hall v. Norwalk Co.*, 57 Conn. 105 (17 Atl. Rep. 356); *Bangor Sav. Bank v. Ins. Co.*, 85 Me. 68 (26 Atl. Rep. 991, 20 L. R. A. 650, 35 Am. St. Rep. 341); *Cobb v. Dolphin Mfg. Co.*, 108 N. Y. 463 (15 N. E. Rep. 488).

It is said that the arbitrator selected by the defendant had great influence over the plaintiff's appraiser, and that he practically hypnotized him. There is no evidence of any such claim. Indeed, the testimony is distinctly to the contrary.

But it is also said that the arbitrators failed to take into consideration a material part of the loss. This is not true. They may not have estimated the damage high enough, but they went over the entire premises, and made their estimates after careful examination.

Further, it is contended that arbitration or appraisal was not a condition precedent to the bringing of suit. One of the conditions of the policy quoted clearly negatives this thought. See *Dee v. Ins. Co.*, 104 Iowa, 167; *Zalesky v. Ins. Co.*, 108 Iowa, 341.

About all there is in the case is that plaintiff was dissatisfied with the amount of the award, and now seeks to avoid it, and to have the matter submitted to some other tribunal. Arbitrations are favored in law, and an award, when made, will be upheld, unless the evidence clearly

shows such misconduct or mistake on the part of the arbitrators as to justify a court in setting it aside. No such showing is made in this case.

Appellee's counsel rely strongly on *Adams v. Ins. Co*, 85 Iowa, 6. But that case is clearly distinguishable from the one now before us. There the arbitration and award was not pleaded as a common-law arbitration. Here it was. And while the arbitration here did not distinctly follow the provisions of the policy, the agreement was valid as a common-law arbitration, and plaintiff could not withdraw therefrom without cause after the award was made. *Harrison v. Hartford Co.*, 112 Iowa, 77; *Coon v. Allen*; 156 Mass. 113 (30 N. E. Rep. 83).

The decree must be reversed, and the cause remanded to the lower court for judgment for the amount of the award, with interest. Plaintiff will pay the costs of the appeal.—REVERSED.

C. F. BROWN, Administrator, Appellant, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY.

Railroads: NEGLIGENCE: DEATH OF FIREMAN. In an action for the death of a fireman who left his cab and was at work about the engine in the switch yards of defendant when he was struck by another switch engine and killed, the evidence is considered and held that no negligence on the part of the defendant was shown.

Appeal from Scott District Court.—HON. J. W. BOLLINGER, Judge.

*THURSDAY, DECEMBER 18, 1902.

ACTION at law to recover damages for the death of Charles J. Goben. There was a trial, and a directed verdict for the defendant. From a judgment on the verdict, the plaintiff appeals.—*Affirmed.*

Connelley & Connelley and *W. M. Chamberlain* for appellant.

Cook & Dodge for appellee.

* 2 published out of its chronological order, by reason of motion for a rehearing.

SHERWIN, J.—For some time immediately preceding his death, and at the time thereof Charles J. Goben was at work for the defendant as a fireman on one of its switch engines in its yard near Valley Junction, Iowa. This yard is situated about five miles west of Des Moines, which is a division point on the line of the defendant's road, and is extensively used for the storage and movement of engines and cars. On the 22d day of June, 1898, at about six o'clock in the morning, the engine which the deceased fired, known as "34," was standing on the store house track in the said yard, and was in his charge. It was steaming at the time, and a considerable amount of the steam was escaping from the angle valve located near the forward end of the engine. About nine feet south of the store-house track was another track, and coming from the west on this track was another switch engine, which at the time was running at the rate of five or six miles an hour. This engine was operated by an engineer and fireman who had also been at work in the yard for some time, and was known as "46." Engine 34 was first seen by the fireman on engine 46 when about three hundred and fifty feet west of her, as they were going east. At that time no one was in sight around 34. When 46 got within eighty or one hundred feet of 34, the deceased got out of the cab of 34, and walked east by her side to the angle valve from which the steam was escaping. He stopped there, took hold of the valve with his hand, and was apparently attempting to fix it. Both the engineer and fireman on engine 46 saw him leave the cab of his engine and go to the valve, and saw, in a general way, what he did there. The engineer of 46 was on the right side of his cab, and watched the deceased until his view was cut off by the front end of his own engine, which was then opposite the cab of engine 34, and when he last saw him he was still at work at the valve. The fireman of 46 watched the deceased until his engine was within eighteen or twenty feet of a point opposite to

where he was at work, when he lost sight of him by the intervention of the steam which was escaping from 34. The fireman testified that just at this moment Goblen took his hand away from the angle valve and stepped backward with his face toward his own engine. It was shown by the testimony of a witness who was at the time some distance east of the point, that when Goblen stepped back from the valve he faced a little northeast, and continued to step back until his feet were inside of the north rail of the track on which 46 was approaching. Goblen was struck and killed, and the negligence charged was in the operation of engine 46, because of the failure to stop it when Goblen was seen to take his hand away from the valve and step back, and because of the failure to blow the whistle while approaching, and more particularly at that particular time. Goblen was perfectly familiar with the constant movement of engines and trains through that yard, and the engineer and fireman on engine 46 knew such to be the fact, and that he was the fireman in charge of engine 34. They were advised by his action in leaving his cab and going to the leaking valve that he was then engaged in the work of repairing or remedying some defect therein, and they would not have been justified in believing or assuming that he would leave that work and place himself in a position of danger. The bell on their engine was continuously rung as they were approaching the point where he was, and, while it is shown that he did not look toward them at any time, we think they had the right to assume, under the circumstances, that he knew of their approach, and that his familiarity with the work in the yard was such that the approach or passing of an engine occasioned no surprise, and called for no notice on his part. There was no negligence on the part of the defendant, and we need not discuss the question of the contributory negligence of the deceased.

The judgment is **AFFIRMED**.

REPORTS
OF
CASES AT LAW AND IN EQUITY
DETERMINED BY THE
Supreme Court
OF THE
STATE OF IOWA.

AT
DES MOINES, MAY TERM, A. D. 1903.

AND IN THE FIFTY-SEVENTH YEAR OF THE STATE.

REEVES & COMPANY, Appellants, v. LAMM BROS., GEORGE
LAMM AND MARTIN LAMM.

Assignments of Error. A single assignment of error in sustaining
1 a motion for a new trial or in arrest of judgment, as to each
and every ground thereof, is not as specific as is required
by Code, section 4136.

Sale of Machinery: PREMATURE SUIT. Where a contract for the
2 sale of machinery provides that a note for a stated amount and
falling due at a specified time shall be given in part payment,
and upon failure to give the note the contract shall stand as
the obligation of the purchaser, having the same force as the
note, a suit on the contract brought prior to the time the note
would have matured is premature.

Appeal from Hardin District Court.—HON. J. R. WHIT-
AKER, Judge.

TUESDAY, MAY 12, 1903.

(283)

ACTION to recover under contract for purchase price of a separator and other machinery, and also on account for the value of said machinery and other items. Verdict for plaintiffs. Motions in arrest of judgment and for a new trial were sustained, and plaintiffs appeal.—*Affirmed.*

Huff & Huff and *Theo. F. Bradford* for appellants.

J. H. Scales for appellees.

McCLAIN, J.—In a motion submitted with the case appellees ask that the action of the trial court sustaining the motion for a new trial and the motion in arrest of judgment be affirmed on the ground that the assignments of error are not sufficiently specific. These assignments in full are as follows: “First. The court erred in sustaining motion for new trial and in sustaining each and every paragraph and assignment thereof numbered from one (1) to fifteen (15), both inclusive. Second. The court erred in sustaining defendants’ amendment to motion for new trial, and in sustaining each and every paragraph and assignment thereof. Third. The court erred in sustaining the defendant’s motion in arrest of judgment and in sustaining each and every paragraph and assignment thereof numbered from one (1) to four (4), both inclusive.” We have distinctly held in former cases that one single assignment of error in the sustaining of a motion for new trial as to each paragraph or ground thereof is not sufficiently specific. This was expressly ruled in *Huss v. Chicago G. W. R. Co.*, 113 Iowa, 343, where it is said that, while exceptions may be taken in this way, assignments of error cannot thus be made. And see, also, *Fitch v. Mason City & C. L. Traction Co.* 116 Iowa, 716, and *Nordine v. Rosengreen*, 89 N. W. Rep. 103. If the appellant desires to insist that the court erred as to each ground of the motion for a new trial,

1. ASSIGN-
MENTS of
error.

he must properly assign the error as to each ground in a separate assignment. This is for the reason that the statute (Code, section 4136) requires that "among several points made in demurrer, motion, instructions, or rulings, the one, or those, relied upon must be separately stated." In a case like this, unless the court sustaining the motion for new trial was in error in sustaining it as to each separate ground, then there can be no reversal, and this necessitates the assignment as specifically as possible of the error committed in the ruling as to each ground, assuming that the court sustained the motion on that specific ground. Of course, if the court sustained the motion only as to certain designated grounds thereof, then the assignments of error should be only with reference to the designated grounds on which the motion is sustained. But, if two or more grounds are designated on which the motion is sustained, or it is sustained generally, then a separate and specific assignment must be made as to each ground thus designated, or all the grounds, if more are designated. The same reasoning applies to the different grounds of motion in arrest of judgment, and it was not sufficient to assign error in the sustaining of that motion, including the sustaining of the four grounds of such motion, in one assignment. The assignments of error being entirely insufficient, the action of the trial court should be affirmed.

Without regard to the objection made to the assignments of error, the action of the trial court was in one respect, at least, evidently correct. The objection urged as one of the grounds for motion in arrest of judgment was that the action was prematurely brought. This was an objection which could be raised by demurrer, and, though not raised by demurrer, might be the basis of a motion in arrest of judgment. Code, section 3563. The action was clearly premature, because as to a portion of the purchase price it was

2. SALE of
machinery:
premature
suit.

stipulated in the contract that a note therefor should be given payable at a date subsequent to that at which the action was brought, and it was further stipulated that, if no note were given, on the failure of the purchaser "to execute and deliver" said note, "this order shall stand as the purchaser's written obligation, and have the same force and effect" as a note. The failure of the purchaser to give the note, which was specifically described as to amount, rate of interest, and time of maturity, could not, therefore, under this contract, make the amount for which the note was to be given due and payable at an earlier date than that named as the time of maturity of the note, for the contract was simply to stand as a substitute for the note, and to be as effectual as though a note had been given.

The action of the trial court is **AFFIRMED**.

FRANK NOVAK *et al*, Appellees, v. JOSEPH PITLICK, Appellant.

Defective Bond: LIABILITY OF SURETY: An incomplete bond, unsigned by the principal, cannot be enforced against a surety in the absence of proof that the surety consented to its delivery in its incomplete condition.

Appeal from Johnson District Court.—HON. M. J. WADE,
Judge.

TUESDAY, MAY 12, 1908.

THE opinion states the case. Judgment *reversed*.

Ranck & Bradley and *Ralph Otto* for appellant.

Bailey & Murphy for appellees.

WEAVER, J.—The plaintiffs allege that they are associated as an unincorporated body or company, known as the Alert Hose Company, at Iowa City, Iowa; that one J. J.

Fryauf was by said company appointed to act as its treasurer for a term of one year from May 1, 1899; that, to secure the faithful performance of said trust, Fryauf executed and delivered to the company a bond in the penal sum of \$200, with the defendant as his surety; that said treasurer has failed and refused to account for and pay over the moneys received by him in said office, to the amount of more than \$200, and recovery is asked in that sum upon said bond. The bond sued upon is in the following form:

"Know all men by these presents that we: J. J. Fryauf as principal and ——— as sureties, all of Johnson County, State of Iowa, are held and firmly bound unto the Alert Hose Company of Iowa City, Iowa, in the sum of Two Hundred Dollars, well and truly to be paid to said Alert Hose Company. The condition of this obligation being that whereas, said J. J. Fryauf was on the second day of May, 1899, duly elected to the office of treasurer of said Alert Hose Company, said term beginning the first Tuesday in May, 1899, and expiring the first Tuesday in May, 1900.

"Now, if the said J. J. Fryauf shall pay over or cause to be paid over and returned to the said Alert Hose Company or its authorized officers, all money and property coming into his hands as such treasurer at the end of his term of office, then this obligation be null and void, otherwise to remain in full force and virtue.

"Witness our hands this ——— day of February, 1900.

"[Signed]

Joseph Pitlick.

"[Stamp.]"

The defendant, by answer, denied the claim of plaintiffs generally, and further alleged that he signed the bond upon condition that it should not be delivered until it was signed by the principal, Fryauf, and another surety, but, in violation of said conditions, it was given to the plaintiffs without such signatures, and showing upon its

face that it was incomplete, imperfect, and prematurely delivered. On motion of the plaintiffs, more or less of the affirmative allegations of the answer were stricken out. Owing to obscurity of statement in the motion, the precise extent and scope of this order is not clear; but this is not very material, as we think the principal point made by the appellant is available under his denials.

I. The plea based upon the alleged condition that the signature of another surety should be obtained before delivering the bond undoubtedly presents a good defense, if it be shown that the obligee received the instrument under such circumstances as to be chargeable with notice of the condition. *Bank v. Boddicker*, 117 Iowa, 407. It is claimed by appellees that no evidence was produced in support of this defense, and there was therefore no error in failing to submit the same to the jury. As the conclusion announced in the following paragraph is decisive of the appeal, we think it unnecessary to enter upon any discussion of this phase of the record.

II. We proceed, then, to consider the effect of the conceded fact that the bond, though purporting to be the bond of Fryauf, as the principal obligor, and though declared upon by plaintiffs in their petition as having been executed by him, was never in fact so executed. The body of the instrument recites the undertaking of J. J. Fryauf as principal and —— as sureties, and is signed by Joseph Pitlick alone; and we have first to inquire whether such obligation is enforceable against the surety in the absence of an affirmative showing of a consent on his part to its delivery in that condition. While some variance may be found in the adjudicated cases upon this question, the great weight of the authorities is adverse to the position of the appellees. It is undoubtedly true that one may bind himself for the debt or default of another without joining with him in the same instrument the person for whom he becomes surety or guarantor; but where

an instrument is drawn by which one person is to be bound as the principal obligor, and another is bound as surety, and undertakes that his principal shall faithfully discharge the terms of the obligation therein assumed by him, it is almost universally held that the surety cannot be held liable upon such contract if it be not signed by the principal. By many authorities such bond is held to be entirely void, while others hold that the obligee may enforce it by affirmatively showing that the surety consented to its delivery without the signature of his principal. Such an instrument shows its incompleteness upon its face. The first glance at it reveals the absence of the principal party to the obligation, and puts the obligee upon inquiry as to the reason for its delivery in that defective condition. It avails nothing to say that the principal is bound to account for the funds in any event, for, whatever his implied liability by virtue of his fiduciary relation to the obligee, he is not bound by the bond which he has never signed, and no recovery can be had against him thereon. By the express wording of the contract, the bond was to be the bond of Fryauf, and it was for Fryauf's performance of the bond which defendant undertook to stand as surety. The obligation of a surety is not to be extended by implication. He is entitled to stand upon the strict terms of his agreement. *Walsh v. Bailie*, 10 Johns. 180; *Gahn v. Niemcewicz's Ex'rs*, 11 Wend. 312; *U. S. v. Boyd*, 15 Pet. 187 (10 L. Ed. 706); *Mid. Nat. Bank v. Richards*, 55 Neb. 682 (76 N. W. Rep. 530). In *Bean v. Parker*, 17 Mass. 594, a bail bond was given for the release of a debtor under civil arrest, but the instrument was not signed by the principal. Upon action brought against the surety, it was held that no recovery could be had. It is there said: "It is essential to a bail bond that the party arrested should be principal. It is recited that he is, and the instrument is incomplete and void without his signa-

ture. The remedy of the sureties against the principal would wholly fail or be much embarrassed if such an instrument should be held binding." In *Wood v. Sampson*, 2 Pick. 24, suit was brought upon an administrator's bond, signed by the surety only, and it was held the action could not be maintained.

The same principle is announced by the Minnesota court in reference to a notary's official bond. *Martin v. Hornsby*, 55 Minn. 187 (56 N. W. Rep. 751, 43 Am. St. Rep. 487). Also to an appeal bond. *State v. Haarle*, 26 N. W. Rep. 906. The defects in these bonds were practically identical with the one now under consideration. In the last-cited case it is said: "It was not the obligation of the principal, for he did not sign it. It did not, so far as appears, bind the sureties, because, from the terms of the instrument, the obligation which they assumed was that of sureties for another, who was principal obligor. It was not, therefore, of effect as a bond of even those who executed it." In Michigan a like rule is observed. *Hall v. Parker*, 37 Mich. 590 (26 Am. Rep. 540); *Johnston v. Kimball*, 39 Mich. 187 (33 Am. Rep. 372). In the latter case Campbell, J., says: "The obligation of a surety cannot fairly be extended beyond the scope of his written contract, inasmuch as, under our statute of frauds, his agreement must be in writing; and we think that, presumptively, at least, where the contract calls for the signature of other parties, the instrument is to be deemed inchoate and imperfect until they also sign it. * * * Where several names are written as obligors, and one of them is called upon to sign it, he does so upon an implied understanding that he can, in case of being held responsible, not only have his right of contribution, but a further right to have it capable of proof and enforcement according to the terms of the contract, as it purports to be drawn up. * * * And if it is claimed that he has waived them or become estopped from relying on them, the

burden of proof ought not to be laid upon him to show that there has been no variation, but upon the plaintiff to show what is substantially a new contract."

In a late decision the Supreme Court of Massachusetts reaffirms the case of *Bean v. Parker*, already cited, saying: "An instrument like that in suit ordinarily is and should be executed by all the intended parties. It was for plaintiffs to show that, although not thus executed, the defendant had consented to its delivery under such circumstances that it would bind him, even if it were inoperative and invalid as against the principal." *Goodyear Co. v. Bacon*, 151 Mass. 460 (24 N. E. Rep. 404, 8 L. R. A. 486). Many other courts have acknowledged the correctness of this principle. "If the bond contains the names of other obligors, and is delivered without the signature of all, the obligee must inquire whether those who have signed consent to its being delivered without the signature of the others." *Fletcher v. Austin*, 11 Vt. 447 (34 Am. Dec. 698). See, also, *Hall v. Smith*, 14 Bush, 604; *Board v. Sweeney*, 1 S. D. 642 (48 N. W. Rep. 302, 36 Am. St. Rep. 767); *Sacramento v. Dunlap*, 14 Cal. 421; *People v. Hartley*, 21 Cal. 585 (82 Am. Dec. 578); *Nush v. Fugate*, 24 Grat. 213 (18 Am. Rep. 640); *Markland v. Kimmel*, 87 Ind. 572; *Sharp v. U. S.*, 4 Watts, 21 (28 Am. Dec. 676); *Duncan v. U. S.*, 7 Pet. 435 (8 L. Ed. 739); *Pawling v. U. S.*, 4 Cranch 219 (2 L. Ed. 601); *Clements v. Cassilly*, 4 La. Ann. 380.

Other cases, while denying that a bond which has been delivered without being executed by all the parties named in the body of the instrument is presumptively void, adhere to the rule that its incomplete appearance has the effect to cast upon the obligee the burden of showing that the delivery was made by the consent of the party signing it, or under circumstances estopping him to deny such consent. *Mullen v. Morris*, 43 Neb. 591 (62 N. W. Rep. 74); *Midland Nat. Bank v. Richards*, 55 Neb. 682 (67 N. W. Rep. 528); *Bank v. Evans*, 15 N. J. Law, 155 (28 Am.

Dec. 400). These holdings are in no manner inconsistent with the rule announced by us in *Benton County Bank v. Boddicker*, 105 Iowa, 548, and sustained by many eminent authorities, that where the bond is perfect on its face, and the obligee receives it without notice of any condition attached to its execution by a surety, it is binding upon the latter, notwithstanding his signature was obtained upon the assurance that others were also to join in the obligation. *Carter v. Moulton*, 51 Kan. 9 (82 Pac. Rep. 633, 20 L. R. A. 309, 37 Am. St. Rep. 259); *State v. Allen*, 69 Miss. 508 (10 South. Rep. 437, 30 Am. St. Rep. 563); *Dair v. U. S.*, 16 Wall 1 (21 L. Ed. 491); *McCormick v. Bay City*, 23 Mich. 457.

Under the law as indicated by the authorities we have cited, we think there can be no recovery upon the bond in suit in the absence of an affirmative showing by plaintiffs that the surety consented to its delivery in its incomplete and defective condition. From this conclusion it follows that the trial court erred in charging the jury, as a matter of law, that the bond was binding upon the appellant, rendering him liable to the amount of the penalty therein named for any default of Fryauf as treasurer. Most of the errors assigned upon the introduction of testimony are governed by this conclusion, and need not be separately considered. Other assignments pertain to questions not likely to arise upon a retrial.

The judgment of the district court is REVERSED.

HORATIO WALES, Trustee Under the Last Will and Testament of Lucia W. Hitt, Deceased, and as Guardian of the Person and Estate of Harold William Hitt, Appellant, v. SAMMIS AND SCOTT, Appellees.

Trusts: INTEREST OF TRUSTEE: RIGHTS OF CREDITORS. Where a

- 1 wife devises one-third of her entire property to her husband and the remaining two-thirds to him in trust for her minor child, with full power to sell and convey the trust estate and reinvest the proceeds, and in the exercise of such power the husband appropriates to his own use or squanders a large part of the estate, he still has a one-third interest in the remaining realty which can be reached by his creditors, his interest attaching to each tract and not in the estate as a whole.

Defalcation of Trustee: RIGHTS OF BENEFICIARY: LIEN OF CREDITORS.

- 2 Where a trustee with power of disposal has a joint interest in an estate with a beneficiary under a will, the beneficiary has no lien on the interest of the trustee to reimburse him for defalcations which is paramount to the lien of the creditors of the trustee that attach prior to the time the beneficiary asserts this claim.

Appeal from Plymouth District Court.—HON. F. R. GAYNOR, Judge.

TUESDAY, MAY 12, 1903.

SUIT in equity to establish a trust in certain real estate, and to enjoin an execution sale thereof under an attachment issued in a case wherein defendants herein were plaintiffs and Homer B. Hitt was defendant. From a decree dismissing plaintiff's petition, this appeal was taken.—*Affirmed.*

E. T. Bedell and Ira T. Martin for appellant.

J. U. Sammis and George C. Scott pro se.

DEEMER, J.—Lucia W. Hitt died testate, April 25, 1897, seised of the real estate in dispute, together with a

large amount of other real and personal property. She left surviving Homer B. Hitt, her husband, and an infant child, Harold William Hitt. By the terms of the will she devised one-third of her estate to her husband, and two-thirds to her husband in trust for her minor child, with the provision that, if the child died before reaching the age of twenty-five years, all the property should go to the husband absolutely. Homer B. Hitt was appointed executor and trustee, and duly qualified as such. Soon after his appointment he appropriated to his own use more than one-third of the estate left by his deceased wife. The real estate, which comprised, among other things, lot 6, block 33, in the town of Lemars, Iowa—the property in dispute—was never partitioned. The will of Lucia W. Hitt was probated in Plymouth county, Iowa, May 7, 1897.

At the time of the commencement of this action, Homer B. Hitt had sold, disposed of, and squandered, not only what would amount to one-third of the property given him by the will, but about three-fourths of the value of the property left to him in trust for his minor child. About December 1, 1897, the defendants, Sammis and Scott, brought action, aided by attachment, which was levied on the real estate in controversy, against Homer B. Hitt, to recover compensation for services rendered Homer B. Hitt, as attorneys at law, for expenses incurred by them in litigation in his behalf, and for money loaned him; and on November 30, 1898, they recovered a judgment *in rem* against Homer B. Hitt's interest in the lot, he being a nonresident of the state, and were about to sell the same on special execution when this action was brought. Plaintiff in this suit was duly appointed guardian of the person and property of Harold William Hitt by the probate court of Cook county, Ill., and qualified as such on the 1st day of March, 1898. And on the 12th day of October, 1899, the circuit court of Cook county removed Homer B. Hitt as executor and trustee, and appointed plaintiff in his stead.

The decree of the circuit court also provided that Homer B. Hitt should convey to plaintiff, as trustee, all the undisposed of real estate belonging to the minor child, the *cestui que* trust, to plaintiff, and on October 13, 1899, he conveyed the real estate in controversy to plaintiff as trustee. A report of this transaction was made to the said circuit court, and was by it approved. This suit is brought to enjoin the execution sale, to enforce the conveyance made to plaintiff, and to establish a trust in the property in favor of plaintiff, as guardian for Harold William Hitt. The grounds for such relief, as stated in the petition, are that "said Homer B. Hitt has appropriated to his own use and benefit more than one-third of the entire estate of Lucia W. Hitt, deceased, and more than the portion devised to him by the said will of Lucia W. Hitt, deceased, and has appropriated to his own use and benefit, and wasted, squandered, and dissipated, more than one half of the portion of the said estate of Lucia W. Hitt, left by her said will to him in trust for their son, Harold William Hitt; and that Homer B. Hitt, by reason of the matters set out in this petition, had no interest in the property attached, at the time of the attachment, subject to levy and sale, to satisfy a personal debt or judgment against him; and that, in any event, the equitable lien of the ward, Harold William Hitt, on the property attached on account of the amount due from said Hitt, trustee, to his said ward, because of said mis-appropriation of the trust funds belonging to said ward, is superior to any lien or claim of general creditors of Homer B. Hitt, individually."

A demurrer to the petition, reciting these facts, based on the ground that plaintiff was not entitled to the relief demanded or to any relief, was sustained, and the appeal is from that ruling. In order that the exact power of Homer B. Hitt, as executor and trustee may be understood, we copy the provision of the will referring to that matter,

which is as follows: "Third. In the event I die leaving issue, then I give and devise and bequeath to my husband, Homer B. Hitt a one-third part of all my real and personal property, of every name and nature, and description whatsoever, that I may die possessed of, to have and to hold the same to himself and his heirs forever, and the remaining two-thirds of all my real and personal property which I may die possessed of I give, devise and bequeath to my husband, Homer B. Hitt, to have and to hold the same upon the trusts and for the uses and purposes hereinafter set forth. The said Homer B. Hitt, trustee, shall have full power and authority to sell and convey any and all of my real estate so devised to him in trust whenever he shall deem best, and to make and execute and deliver good and sufficient deed or deeds for the same to any purchaser or purchasers thereof; and shall have full power and authority to invest all of the personal property, and the proceeds realized therefrom, together with the proceeds realized from the sale of real estate, so devised to him in trust, in loans secured upon income producing real estate and shall keep the same so invested until my child surviving shall arrive at the age of twenty-five years, and the net annual income realized from the investments of the two-thirds of my estate so devised in trust shall be used so far as the same is necessary, to properly clothe, support, and educate my child; and the balance of said net annual income not needed for that purpose shall be added to the principal of said trust estate by my said trustee and re-invested by him, and that when my said child surviving me shall arrive at the age of twenty-five years, I then desire and direct my said trustee to pay and deliver to my said child surviving me all of the principal of said trust estate, with the accumulation thereto to be and become the absolute property of my said child who shall survive me, and his heirs forever. In the event my child who shall survive me does not live to be twenty-five years of age, then I desire and

direct that all of said trust estate shall be and become the absolute property of my husband, Homer B. Hitt and his heirs forever."

It will be observed that the trustee had full power to sell and convey all the property devised to him in trust whenever he should deem best, and to invest the proceeds in a certain manner. As the trustee was thus expressly authorized to sell and convey all the real estate, whether devised absolutely to him or in trust for his minor child, he was guilty of no wrong in making the sales referred to in the petition. His wrong consisted in not investing the proceeds as required and directed by the will. We shall assume, in the absence of allegations to the contrary, that Homer B. Hitt, when he was appointed trustee, was required to give bonds to cover such delinquencies on his part.

The question in the case is: Is plaintiff entitled, under the showing made, to the relief asked, or to any relief whatever? We should be glad to protect the minor child's interest in his mother's estate, if it were possible to do so under any known rules of law, but, after a careful examination of counsel's argument, aided by such independent investigation as we have been able to make, we see no way to avoid the conclusion that the ruling of the court is correct. The will gave to Homer B. Hitt one-third of all the real property, of every name and description, owned by the testatrix at the time of her death, absolutely, and devised the other two-thirds to him in trust for the purposes named. Therefore Homer B. Hitt took title to one-third of the real estate in controversy, absolutely. This remained in him until in some manner divested according to law. Appellant contends, however, that the will devised to Homer B. Hitt one-third of the entire mass of property, and not one-third of each aliquot part, and that a court of equity should treat the property in controversy under the facts above recited as belonging to the infant ward. But this

1. Interest of
trustee; rights
of creditors.

is not the rule. The real estate owned by the testatrix was situated in at least two different states, and we doubt if it is possible to devise real property so situated, as that the title is held in abeyance until an accounting is had by the trustee and the court determines where it is. Our understanding of the law of real property is that a devise of this character vests the title in each parcel of the real estate as provided in the will, to wit, one-third absolutely in the husband, and the other two-thirds in him as trustee for the *cestui que* trust for the uses and purposes named. While estates, under our statutes, may be created to commence at a future day (Code, section 2917), the title is and must be in some one at all times. And so it follows that under the will of Lucia W. Hitt, Homer B. Hitt took an one-third interest in the property in controversy, absolutely, at the time of the testatrix's death. This he did not dispose of until the conveyance to plaintiff under orders of the circuit court of Cook county, Ill., on October 18, 1899, which was long after defendants' attachment was levied.

But it is argued that there was at all times an equity in favor of the *cestui qui* trust and his guardian to have the amount of Homer B. Hitt's defalcations made a charge

2. DEFALCA-
tion of trustee:
rights of ben-
eficiary: lien
of creditors.

upon his land, and that this equity is superior to the claims of his (Homer B. Hitt's) creditors. This presents the only plausible theory for reversing the ruling of the trial court. It should be remembered in this connection that the real estate in controversy was not acquired with trust funds. It came to Homer B. Hitt directly from his wife under the provisions of the will quoted, and has in no manner been augmented by the proceeds of the trust estate. If it could be shown that any part of the trust estate went into this property, or that it was acquired with funds any part of which belonged to the *cestui que* trust, doubtless appellant should have the relief he seeks for the protection of his ward's estate. But such is not the case. According to

plaintiff's own showing, the money received by Homer B. Hitt for his minor child was squandered or appropriated to his own use and benefit. In such case there is no equitable lien upon or title to the real estate owned by him, which was derived from his wife under the will. At most, plaintiff has a mere equitable right to sequester the real estate owned by Homer B. Hitt to the payment of the amount of the proceeds of the real estate held by him in trust which he squandered or otherwise used for his own benefit. But this equitable remedy will not prevail over a prior attachment by another creditor. There is no allegation that defendants had notice of the proceedings of the courts of Cook county, Ill., and, even if there were, such proceedings were long after they had begun their attachment proceedings, and were therefore not binding upon them. A mere equitable claim or right will not take priority over an attachment levied before action brought to establish the claim or remedy. Equitable titles or liens may, under certain circumstances, be protected, but not a mere inchoate right or remedy. Pomeroy's Equity Jurisprudence (2d Ed.) section 681. There seems to be no ground for granting plaintiff a priority over the attachment. That there may be no misconstruction of this opinion, it is well to state that the legality of the attachment on the undivided one-third interest in the property is in no manner questioned.

The ruling on the demurrer was right, and the judgment is **AFFIRMED**.

HENRY BORN V. THE HOME INSURANCE COMPANY, Appellant.

Insurance: CONTRACT: WHAT LAW GOVERNS. The law of the

- 1 place where an agreement is finally consummated will govern the contract, unless it is shown that the same was to be performed elsewhere.

Contract of Insurance: WHERE COMPLETE, Where an application

- 2 for insurance is taken by a local agent and sent to another

state for approval by a general agent under a stipulation that it should not be binding until there approved, and the approval is there made, except as to the premium, which is increased and the local agent so notified, the contract is not complete until such change is agreed to by assured, and in the absence of a showing that he accepts by letter direct to the general agent, the contract will be considered as completed at the place of residence of the local agent.

Same. Where a contract of insurance is approved in part by the
3 company and a counter proposition made as to that part, it becomes effective by an acceptance of the change by the assured.

Representation of Title. A statement by assured in his application
4 for insurance that he holds an equitable title, when he in fact has a contract for the land which he has pledged as security for a debt, is not a misrepresentation as to title.

Appeal from Cedar District Court.—HON. W. N. TREICHLER, Judge.

TUESDAY, MAY 12, 1903.

ACTION on a fire insurance policy. Trial to the court, and a judgment for the plaintiff, from which the defendant appeals.—*Affirmed.*

Mc Vey, Mc Vey & Grham for appellant.

Smith & Smith for appellee.

SHERWIN, J.—This is the second appeal in this case. The decision on the first appeal is reported in 110 Iowa, 379, where a full statement of the facts will be found. We there held that sections 1729 and 1730 of McClain's Code had not been complied with, and that the notice sent to the plaintiff was not sufficient to suspend the policy. To avoid the effect of that holding, the defendant urges that the contract is an Illinois contract, and that the statute in question does not apply thereto or control it. With this contention we cannot agree. It is, of course, elementary that a contract is never made until the minds of the

parties meet, and they have agreed to exactly the same thing. When this has been done, the place where the agreement was finally consummated becomes the place of the contract; and, unless it be shown that it was the intention of the parties that it should be performed at some other place, it will ordinarily be governed by the law of the place where it was executed. The plaintiff's written application for insurance was taken by the defendant's local agent. It asked for tornado as well as fire insurance, and the agreed premium for both was \$66, for which the plaintiff executed and delivered his notes to the agent. Both were sent by the agent to the defendant's Western department at Chicago for approval. The application stipulated that no liability should attach until it was so approved. It was received and approved by the Chicago department in all respects, except as to the amount of the premium. This was raised \$8, making the combined premium \$74, instead of \$66. The additional amount was charged to the local agent, and afterwards remitted by him to the defendant—just when does not appear. The policy was countersigned at Chicago on the 23d day of May, 1893, and afterwards delivered to the plaintiff; but whether by letter or by the agent who took the application does not certainly appear, although it does appear that the agent kept the policy in his safe for the plaintiff, and from this an inference may perhaps be drawn that it was delivered to the plaintiff by him. But however this may be, we do not deem it controlling. The real question is, where was the contract completed?

It was not in Chicago, when the application was received, because of the requirement that additional premium be paid, and it could not have been completed until this requirement was assented to by the plaintiff. The \$8 was charged to and remitted by the agent, and there is absolutely nothing indicating any correspondence by letter between the

1. **CONTRACT:**
what law
governs.

2. **CONTRACT**
of insurance:
where com-
plete.

plaintiff and the defendant relative to this matter. The agent, then, must have been the medium through whom information was conveyed to the plaintiff of the additional charge; and, if this be true, his assent thereto must have been given in this state, and the contract finally completed here. On this point we adopt the defendant's quotation from 1 May, on Insurance (4th Ed.) section 66: "It follows from the rule that the contract is completed when the proposals of the one party have been accepted by the other by some appropriate act signifying the acceptance, that the place of the contract is the place of the acceptance. And if an agent, residing in one state, of an insurance company, resident in another, forwards the requisite papers to the home office, and a policy is thereupon issued and mailed directly to the applicant, the contract is a contract made in the state where the home office is situated; and, since the acceptance is the test of completion, it would seem that a transmission of the policy by mail to the agent, to be delivered by him to the applicant, would have the like effect." See, also, same vol., section 43; *Marden v. Hotel Ins. Co.*, 85 Iowa, 584; *Stephens v. Capital Ins. Co.*, 87 Iowa, 283. In *Commonwealth Mut. Fire Ins. Co. v. Knabe & Co. Mfg. Co.*, 171 Mass. 265 (50 N. E. Rep. 516), it was held that the contract was a Massachusetts contract, because it was completed there, and a delivery of the policy made by letter to the defendant's agents. In *Allgeyer v. State of Louisiana*, 165 U. S. 578 (17 Sup. Ct. Rep. 427, 41 L. Ed. 832), it was conceded that the policy was a New York contract, and the question we are considering was not there determined.

The agreement that no liability should attach until there was an approval of the application by the defendant cannot, alone, change the situs of the contract, for that meant simply that the company should not be liable until it had approved the contract

made by its local agent; and when it disapproved it in part, and made a counter proposition, which was accepted by the plaintiff, it would be idle to contend that it must reaffirm its own act. This was an Iowa contract, controlled by the statute in question.

It is said that the plaintiff misrepresented his title, and that he mortgaged a part of the property in violation of his contract. He stated that he had an equitable title, and this, we think, was true. He held a contract for the land, which he had pledged as security for a debt. Surely his title, under the contract, was correctly stated, and the fact that he had pledged this interest did not change its character. Moreover, the defendant's agent who took the application had full knowledge of the exact condition of his title, and by that the defendant is bound. *Jordan v. State Ins. Co.*, 64 Iowa, 216; *Siltz v. Hawkeye Ins. Co.*, 71 Iowa, 710; *Scott v. Ins. Co.*, 98 Iowa, 67. The contention that the property was mortgaged was settled adversely to the defendant on the first appeal, and is the law of the case.

The judgment is **AFFIRMED**.

LORD, OWEN & COMPANY, Appellant, v. HARRY L. WOOD,
Appellee.

Attachment: OBJECTION TO SALE: DAMAGES: ESTOPPEL. After

- 1 levy of attachment, the sheriff summoned a jury to determine the danger of depreciation in value of the attached goods, before whom defendant appeared and protested against a sale. Held, defendant was not estopped by such appearance from claiming damages for a wrongful attachment after such protest.

Wrongful Attachment: STATEMENT OF CREDITOR: EVIDENCE.

- 2 Where a wrongful attachment is an issue and malice is alleged, a conversation with the creditor at the time the debt was incurred regarding the date of payment is admissible.

Evidence: STATEMENTS OF ATTORNEY'S CLERK: ADMISSIBILITY OF.

- 8 The statement of a clerk employed in an attorney's office, who has actual charge of the collection of the account and who authorizes the attachment, which is subsequently approved by the attorney, relating to the grounds of the attachment, is admissible against the client in a suit for wrongful issuance and levy of the writ.

Wrongful Attachment: INSTRUCTION. On an issue for wrongful

- 4 attachment, an instruction that if the jury find that plaintiff "did not believe or had no reasonable ground for believing" that defendant was about to wrongfully dispose of his property, the attachment was wrongful, and a recovery may be had, is error, as it ignores the fact that defendant must also prove that the ground of the attachment was in fact untrue.

Measure of Damages: INSTRUCTION. In case of a wrongful at-

- 5 tachment, the rent of a building for which defendant was liable and in which he was conducting his business at the time of the attachment, and the value of defendant's time in the particular business in which he was engaged are proper elements of damage, and an instruction not in accordance herewith is error.

Appeal from Wright District Court.—HON. J. R. WHITAKER,
Judge.

TUESDAY, MAY 12, 1903.

ACTION by plaintiff, a copartnership, aided by an attachment, on an account for merchandise sold and delivered to defendant. The answer admits the account sued upon, and in a separate count sets up a counterclaim, based on the attachment bond, for damages alleged to have been caused by the wrongful suing out of the writ. A jury trial was had, resulting in a verdict in favor of defendant. Judgment was rendered on the verdict, and plaintiff appeals.—*Reversed.*

Birdsall & Birdsall for appellant.

Filkins & Schaffter for appellee.

BISHOP, C. J.—At the time in question appellee was a retail druggist doing business at Woolstock, Wright county.

The attachment writ was levied upon his stock of goods, and the sheriff took possession of the store. This occurred January 17, 1901. After the counterclaim, which included an item of damages for depreciation in value and injury to the stock, was filed, and on February 20, 1901, the plaintiff applied to the sheriff for an order for the sale of the attached property in accordance with the provisions of chapter 101, Acts 27th General Assembly. Pursuant thereto the sheriff summoned a jury, which met and examined the stock and returned a finding to the effect that it was not necessary to dispose of the stock. The defendant appeared before such jury and protested against a finding in favor of a sale. Thereafter the plaintiff filed a reply in which was pleaded such action on the part of defendant, and alleging that he became thereby estopped from claiming damages for any further depreciation in the value of the stock of goods. To such reply the defendant filed a demurrer, based upon the ground that the facts as pleaded are not sufficient to constitute an estoppel, and this was sustained. During the progress of the trial the plaintiff offered in evidence the affidavit and notice to defendant, pursuant to which the sheriff's jury was impaneled; also the written finding of such jury. These were objected to as incompetent and immaterial and the objection was sustained. Errors are assigned upon the ruling sustaining the demurrer and sustaining the objection to the evidence offered, and such rulings may be considered together.

The provisions of the statute referred to in substance are that when the plaintiff makes affidavit that the attached goods are in danger of serious and immediate waste

1. OBJECTION
to sale, dam-
ages: estoppel. necessarily be attended with such expense as greatly to depreciate their value, the sheriff may summon a jury to examine the same, and shall give notice to de-

fendant, who may appear and have a personal hearing. If the jury are of the opinion that the property should soon be disposed of, they shall specify a day beyond which the same should not be kept, etc. As we have seen, the defendant in this case did appear and protested against a finding in favor of a sale. But we cannot agree that by such conduct he became estopped from making claim for damage growing out of a depreciation in the value of the goods thereafter occurring. His attitude from the beginning had been one of protest because of the alleged wrongful seizure of his stock. His appearance before the sheriff's jury amounted to nothing more than a continuation of his protest. On the other hand, if the issuance of the writ of attachment and the levy thereof were wrongful, the plaintiff cannot complain if it be held responsible for all natural and proximate damages resulting therefrom. Certainly it might shield itself behind a consent given by the defendant, but no reason occurs to us for holding that it could with like result take refuge behind an express and emphatic protest. Nor can it be said, as contended for by counsel for appellant, that by his protest the defendant prevented a sale of the goods, which being had, would have cut off any farther waste or deterioration, and therefore the plea of estoppel should be upheld. The grounds of the protest made do not appear, but, considering the attitude of defendant, it is fair to presume that he was objecting to the interference with his business and a summary disposition of his property at forced sale. Moreover, the conclusion that the finding of the jury was influenced by the protest is unwarranted. The province of the jury was confined to a determination of the question whether an immediate sale was required in view of the character and condition of the property. Upon this question the jury might consider evidence offered and hear arguments, but the protest made could have no bearing. So too, it is not contended that the plaintiff changed its

position, or otherwise acted dterimentally to its own interest, by reason of the conduct of defendant as alleged, and there can be no estoppel where such is not made to appear. *Morris v. Sargent*, 18 Iowa, 90; *Tufts v. McClure*, 40 Iowa, 317.

II. The defendant and his mother were permitted to testify, over the objection of plaintiff, to a conversation had with one member of the plaintiff firm on the date when the account in question was first opened upon the subject of the time within which defendant would be expected to pay for goods thereafter purchased by him on credit. In this there was no error. Malice was alleged in the pleading filed by defendant, and all matters directly connected with the conduct of the business transactions had between them was relevant to the issue thus tendered.

Complaint is also made, based upon the admission in evidence of certain declarations made by one A. G. Wambach. These had relation to the grounds for the attachment. It appears that the plaintiff firm was a resident of Chicago. It sent the claim here in suit to George Wambach, an attorney at Webster City, this state. At the time such claim arrived, George Wambach was absent from home, his office being in charge of his son A. G. Wambach. The latter was not an attorney, but he took charge of the claim, and went to Woolstock several times making efforts to collect it. He caused the petition for attachment to be prepared by another attorney, and furnished the information upon which the allegations thereof were based. Upon the return of the father, the facts were laid before him by his son, and thereupon the petition was filed, and the writ caused to issue. In one connection the said George Wambach swears that in so doing he acted upon the information furnished by his son, who was connected with him in business, and who acted as agent for plaintiff in the mat-

2. WRONGFUL attachment: statement of creditor: evidence.

3. EVIDENCE: statements of attorney's clerk: admissibility of.

ter of suing out such attachment. In view of the facts thus appearing, we are clearly of the opinion that what was said and done by A. G. Wambach was competent and material as bearing upon the question of the existence of grounds for the attachment, and the belief of plaintiff with respect thereto. Plaintiff does not repudiate the attachment as unauthorized, and A. G. Wambach, the clerk or associate of his father in business, alone acted in the premises up to the time of filing the petition. The case is unlike that presented in *Antrobus v. Sherman*, 65 Iowa, 230, cited and relied upon by appellant. There the attorney holding a claim for collection, without the knowledge or consent of his client, sent such claim to a firm of attorneys in another county, and it was held that the client was not liable for the acts of the latter. Here the business was transacted from the office to which the claim was sent, and by one regularly employed in such office. Clients cannot, in reason, expect that every act in connection with the business affairs intrusted by them to an attorney will be done by him personally. In the very nature of things, much of the detail work must be done by assistants under the supervision of such attorney. To say that for the particular acts done by such an assistant the client is under no responsibility, might lead to the gravest abuses. It is our conclusion that there was no error in the rulings complained of.

III. The court gave to the jury an instruction as follows: "So, if you find by the preponderance of the evidence that at the time the plaintiffs sued out said writ of attachment against the defendant, they did not believe, or had no reasonable grounds for believing, that the said defendant was about to dispose of his property with intent to defraud his creditors, then the suing out of the attachment would be wrongful, and the plaintiff is liable to the defendant on his counterclaim for actual damages sustained." The giving of such instruc-

4. **WRONGFUL
attachment:
instruction.**

tion was error. The allegation of the petition is that "the defendant is about to dispose of his property with intent to defraud his creditors." If that allegation be true in point of fact, or if the plaintiff have reasonable grounds for believing the fact to be true as alleged, there can be no recovery of damages on account of the issuance of the attachment, as the same would not be wrongful. *Vorse v. Phillips*, 37 Iowa, 428; *Deere v. Bagley*, 80 Iowa, 205; *McCormick H. M. Co. v. Colliver*, 75 Iowa, 559. In the case last cited an instruction similar to the one given in the case before us was under consideration, and the court said: "The burden of proof is on the one alleging the wrongfulness of the act of suing out of the writ, and to establish his allegation he must prove not only that the party who caused it to be issued had no reasonable grounds for believing that the allegations upon which it was issued were true, but that they were not true in fact. Under the instruction in question defendant was allowed to recover on proof of but one of these states of fact." We are not able to agree that, in view of the other instructions given, the one in question could not have been prejudicial. It is very easy to see that the jury may have taken it as their guide in arriving at a conclusion.

IV. The giving of the thirteenth instruction is assigned as error. It is as follows: "Such actual damages would be the damages, if any, shown by the evidence to
s. MEASURE of the property levied upon while in the hands
damages: of the said sheriff, and up to the present
instruction. time; the rent of the building in which said property is located from the time said levy was made and possession taken by the sheriff up to the present time, at the agreed rental price to be paid for the same, provided you find that the defendant is liable to the owner of said building for the rent of the same during said time; and the reasonable wages or value of his time that the defendant has lost during the time that the sheriff has said

property in his possession, up to the present time, and by reason of the defendant not being able to obtain other employment, if the evidence shows such facts." The instruction is correct as far as the same has relation to the question of rent of the store building. Actual damages are intended to be compensatory only, and, if the defendant be made whole, whether the amount of his damage be much or little, he must and can well be satisfied. On the other hand, the plaintiff, in suing out the attachment and giving the bond, in effect agrees that he will respond by payment of all actual damages in point of fact sustained by defendant, in case it shall be held that the issuance and levy of the writ was wrongful. We are of the opinion, however, that the instruction is wrong in so far as it relates to the time alleged to have been lost by defendant. It seems to us that, if plaintiff is liable at all, the measure of damages for loss of time must be limited to the value of his time in the particular business in which he was engaged. Such damages cannot be measured by what he might have earned by working for some one else, or at some other place. The question is not what he was capable of earning, but what has he lost?

Other errors assigned will not be likely to arise upon a retrial, and for that reason need not be discussed. For the errors pointed out, the judgment must be and it is REVERSED.

T. C. HENDRYX v. WM. M. EVANS AND H. N. MOORE,
Appellant.

Title on Execution Sale Under Nebraska Law. Under the laws

- 1 of Nebraska the title to real estate of a purchaser at an execution sale is not complete until the same is confirmed by the court.

Same: WHEN DEED MAY ISSUE. The purchaser at an execution
2 sale in Nebraska, where the sale has been confirmed by the

court, is entitled to a sheriff's deed at any time before the filing of a petition in error, notwithstanding the execution of a supersedeas bond, under section 590, Revised Statutes of Nebraska.

Good Faith Purchaser. A creditor acquiring a sheriff's deed at a
3 lawful sale is a good faith purchaser.

Release of Surety: EVIDENCE. Where property of the principal
4 debtor has come under the control of a creditor, either by a voluntary act of the debtor or by legal process for the purpose of application to the debt, a voluntary relinquishment of such security will discharge a surety from liability to an extent corresponding with its value. Evidence considered and held to release the surety under the above rule.

Laws of Another State: OPINION OF ITS COURTS. Courts of one
5 state will not take judicial notice of laws of another, but the opinions of a court of last resort in construing its statutes are entitled to weight.

Appeal from Montgomery District Court.—HON. A. B. THORNFELL, Judge.

TUESDAY, MAY 12, 1903.

THE plaintiff demanded judgment on two promissory notes of \$1,000 each, executed February 25, 1896, by William M. Evans and H. N. Moore, payable in one and two years, and bearing interest at the rate of six per cent. per annum. Moore only was notified, and in his answers admitted liability but for certain defenses interposed. After the evidence had been introduced, verdict was directed for the plaintiff. From judgment entered thereon the defendant appeals.—*Reversed.*

C. E. Richards and *P. W. Richards* for appellant.

T. J. Hysham and *Holmes & Morgan* for appellee.

LADD, J.—The defendant Moore signed the two notes in suit as surety for his son-in-law, Wm. M. Evans, and admits his liability thereon, unless released by proceedings in the courts of Nebraska against Evans. Plaintiff

began an action against the latter in the district court of Sarpy county of that state, January 13, 1898, for the amount owing on these notes, aided by a writ of attachment, which was levied upon Evan's real estate. Evans filed answer, and, upon trial, judgment was rendered against both, November 18th of the same year, including an order sustaining the levy of the writ of attachment and directing a sale of the property. No notice was served on Moore, and the judgment as to him was void for want of jurisdiction. Special execution issued, and said property was sold by the sheriff to the plaintiff, January 30, 1899. He thereupon applied to the court for a confirmation of the sale, in accordance with the practice of that state, February 27, and the court entered the required order of confirmation March 15th, notwithstanding objections interposed by Evans, who filed a supersedeas bond April 3d, and perfected his appeal therefrom. Entirely without his authority, Moore's name was attached to the petition in error and the supersedeas bond. The twelfth error relied on, in effect that the affidavit of publication of notice of sale was insufficient, was confessed by plaintiff in September, 1900, and on his motion the order of confirmation was reversed, and in pursuance thereof the sale set aside by the district court, December 17th following. Long prior to this, February 15, 1896, Evans had executed a mortgage on the real estate attached to one Phillips, securing the payment to him of \$4,000, which mortgage was not recorded until October 24, 1899. Evans was solvent in 1898, but insolvent at the beginning of the present action.

The appellant insists that, by the levy upon and sale of the real estate, plaintiff acquired security for the satisfaction of the notes, that this was lost by his failure to promptly procure and record a sheriff's deed, thereby obtaining title freed from the lien of the Phillips mortgage, and that because of such want of diligence the defendant as surety is relieved

1. TITLE ON execution sale under Nebraska law.

from liability, save for a small sum not covered by the sale. Under the laws of Nebraska, the sale of real estate by the sheriff under execution is not regarded as complete until confirmed by the court, and an appeal is allowed from the order of confirmation. See section 498, page 478, Revised Statutes, Neb. Said the Supreme Court of that state in *State Bank v. Green*, 10 Neb. 130 (4 N. W. Rep. 942): "Under our law governing sales of real property under execution, the title of the purchaser depends entirely upon the sale being finally confirmed by the court under whose process it was made, and until this was done the rights of the execution debtor are not certainly divested." This was cited with approval in *Lamb v. Sherman*, 19 Neb. 687 (28 N. W. Rep. 319). In *State v. Green*, 8 Neb. 299 (1 N. W. Rep. 210), in holding orders of confirmation appealable, it was said that "no title passes by the sale until it is confirmed, and the same rule applies to the sales under execution." In *Yeazel v. White*, 40 Neb. 432 (58 N. W. Rep. 1020, 24 L. R. A. 449), the court, after reviewing previous decisions, concluded that "the legal title of Einspahr to the land sold was not divested, nor did Yeazel acquire the legal title to such real estate, until the delivery to him of the sheriff's conveyance made in pursuance of the order of confirmation of sale." As said by Judge Brewer in *Young v. Deputron* (C. C.) 37 Fed. Rep. 46, approved in the same case on appeal in *Deputron v. Young*, 134 U. S. 241 (10 Sup. Ct. Rep. 539, 33 L. Ed. 923): "It is settled law of Nebraska that the title of a purchaser at an execution sale depends not alone upon his bid or payment of the purchase money, but upon the confirmation of the court of the sale." See, also *Allen v. Elderkin*, 62 Wis. 627 (22 N. W. Rep. 842), and *McBain v. McBain*, 15 Ohio St. 337 (86 Am. Dec. 478), cited in the opinions mentioned.

This sale was confirmed in the district court March 15, 1899, and at that time the plaintiff was entitled to a

sheriff's deed which would have conveyed to him the judgment defendant's interest in the land, and
2. SAME: when deed may issue. "vested in the purchaser as good and perfect an estate in the premises therein mentioned as was vested in the party at or after the time when such land and tenements became liable to the satisfaction of the judgment." Sections 499, 500, page 478, Revised Statutes, Nebraska. The plaintiff was not prevented from obtaining this deed by the filing of the supersedeas bond, for the statute of Nebraska provides that, before such undertaking shall operate to stay execution of the judgment or order, a petition in error must be filed in the appellate court. Section 500, page 498, Revised Statutes, Nebraska. The petition was not filed until October 12, 1899. Until that time he was at liberty to procure the deed and place it upon record, thereby acquiring title freed from the lien of Phillips, and subject only to the contingency of a reversal of the order of confirmation by the Supreme Court; for the rule prevailing in Nebraska is that a prior unrecorded deed or mortgage, executed in good faith and for a valuable consideration, will take precedence of a conveyance based on a sheriff's sale made under attachment or execution, if recorded before evidence of title based on the judicial sale is recorded; otherwise, if recorded afterwards. *Sheasley v. Keens*, 48 Neb. 57 (66 N. W. Rep. 1010); and cases cited. This necessarily follows from the wording of section 4108 of the Compiled Statutes: "All deeds, mortgages and other instruments in writing which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages and other instruments shall be first recorded; provided that such

deeds, mortgages or instruments shall be valid between the parties." The fact that an appeal may be taken from the order of confirmation can make no difference. It continues in full force, notwithstanding the appeal, until reversed. *Creighton v. Keith*, 50 Neb. 810 (70 N. W. Rep. 407); *Watson v. Richardson*, 110 Iowa, 698. And upon affirmance the order stands ratified and confirmed as originally entered, and the rights of the parties necessarily relate back to that time.

That a creditor acquiring a sheriff's deed in pursuance of a lawfully conducted sale on a valid judgment is a good-faith purchaser for value and entitled to protection is not open to question in this state (*Gower v. Doheney*, 33 Iowa, 36), and we think the same rule finds approval in *Sheasley v. Keens*, *supra*, and like decisions in Nebraska. Upon reversal without fault of the creditor he would doubtless not be entitled to protection, and a new sale had, the same as though none had preceded it. But the reversal was of the plaintiff's procurement. As he failed to take, and record the sheriff's deed to which he was entitled, the recording of Phillips' mortgage, October 24, 1899, gave the latter priority over his judgment, and manifestly this is what led him to procure the *pro forma* order of the reversal in the Supreme Court by confessing an error in the order, presumed to have been correct, which he knew, and the transcript conclusively demonstrated, did not exist. The very purpose was to shield him from the result of his delinquency in not perfecting title to the land before the recording of the Phillips mortgage. In these circumstances, neither the reversal nor subsequent order of the district court of Sarpy county in pursuance thereof setting aside the sale afford any protection against the charge of negligence. As contended, the lien of judgment continued as before, but subject to that of Phillips' mortgage, the *bona fides* of which was not put in issue. To the extent of the amount due

thereon, exceeding the sum owing on these notes, then, the security acquired by the levy on the real estate has been impaired. The record indicates this could have been avoided by the procurement and recording of the sheriff's deed.

Was the omission to do so such negligence as will relieve defendant from liability to the extent of the consequent loss? The plaintiff could not have been deceived by the judgment entered against Moore, for no property of his was attached, and the service of notice was by publication. The judgment was therefore void upon its face. Not having been a party to the judgment against Evans, and having made no objection to the confirmation of the sale, Moore was a stranger to the record, and not in a situation to appeal. So that, while Hendryx may not have known that the filing of the petition in error was wholly without authority, he did know that Moore was not a proper party to the appeal, and had no right to be heard. In these circumstances, his connection with the record furnished Hendryx no excuse for not perfecting his title to the land under the sale. It must be held that, in omitting to procure and to record the sheriff's deed within the nearly seven months that this might have been done, the plaintiff was negligent, and did not properly protect the security he had acquired through the process of the court. When property of the principal has come under the control of the creditor, either by voluntary act of the debtor or by process sued out by the creditor for the purpose of being applied on the debt, a voluntary relinquishment thereof will discharge the security to an extent corresponding with its value. *City of Maquoketa v. Willey*, 35 Iowa, 328. The plaintiff was not bound to put his notes in judgment against Evans, nor, having done so, was he required to cause execution to be levied. After having done all this, however, he cannot be permitted to surrender any security acquired to the detri-

4. RELEASE of
surety: evi-
dence.

ment of the surety without the latter's consent. His duty is to exercise active diligence in preserving liens, but not in acquiring them, unless his contract so exacts. This much is settled by the decision last cited, notwithstanding the conflict of authorities elsewhere. To the same effect, see *Sherraden v. Parker*, 24 Iowa, 28; *Whitehouse v. American Surety Co.*, 117 Iowa, 328, and *Read v. American Surety Co.*, 117 Iowa, 591.

This is on the theory that the creditor thereupon becomes invested with the obligations of a trustee in respect to the lien, and any neglect which results in depriving the surety of the benefits of the security thus acquired and of the advantage of subrogation thereto will, to the extent of the loss, relieve him from liability. For the surety is entitled, upon the payment of the debt, to be subrogated to the rights of the creditor in all securities acquired by him at any time for the satisfaction thereof, and, if this right is rendered unavailing by the negligent omission or commission of some act of the creditor which was essential to the protection of such securities, he, rather than the surety, should suffer the loss. The law doubtless permits the creditor to remain passive when his inaction does not impair the security, or when the circumstances are such that the surety may protect himself; but, when something is essential to be done by him in order to save or preserve the security, the better opinion is that diligence should be exacted. The distinction is illustrated by the rule holding the creditor to the duty of preserving the priority of a mortgage or other lien by filing it for record. *Burr v. Boyer*, 2 Neb. 265; *State Bank v. Bartle*, 114 Mo. 276 (21 S. W. Rep. 816); *Sullivan v. State*, 59 Ark. 47 (26 S. W. Rep. 194). This is on the ground that the instrument evidencing the lien is within the creditor's sole custody and control, and no opportunity open to the surety for his protection. But, after recording, the creditor is under no obligation to foreclose, for the surety may pay the debt,

and thereby be subrogated to the rights of the creditor, and prosecute foreclosure proceedings himself. *Fuller v. Tomlinson*, 58 Iowa, 111; *Grisard v. Hinson*, 50 Ark. 229 (6 S. W. Rep. 906). The surety upon the maturity of the debt ought to pay it, and if he neglect to do so, thereby putting himself in a position to protect his own interests, he is quite as much at fault as the creditor in failing to enforce the claim. To relieve the surety under such circumstances would be like allowing a man to profit by his own wrong. Stearns on Suretyship, section 99. In *Horseman v. Todhunter*, 12 Iowa, 230, an instruction to the effect that withholding a mortgage from record was a fraud on the surety was declared erroneous. Manifestly, such omission did not amount to fraud as between the parties, but may have constituted such negligence as ought to have discharged the surety—a point apparently not raised by the pleadings, and certainly not in argument. In *Schroeppell v. Shaw*, 3 N. Y. 457, an omission of an act necessary to render an assignment effectual was held to discharge the surety. Here there was practically no trouble or expense, such as is sometimes said to excuse the passive delay of the creditor. Taking and recording the sheriff's deed was essential to the protection of the lien acquired. It was beyond the power of the surety, and could have been accomplished by no one save the plaintiff. This duty, we think, devolved upon him. By omitting it, the lien of his judgment was postponed to that of the Phillips mortgage, otherwise it would have been satisfied in the sum realized from the sale. Presumably the land was worth the amount of the bid, and, had the deed been procured and recorded within a reasonable time, he would have acquired a clear title thereunder. This being true, defendant's obligation would have been satisfied to the extent of the amount realized. We think that owing to plaintiff's want of diligence, through which the priority of

his lien was lost, the same result should follow, and that liability of defendant on the notes must to that extent be held to have been discharged.

We have not deemed it necessary to set out all the statutes referred to and conceded to have been in force in Nebraska, as their proper construction does not seem to be seriously questioned. Counsel on both sides have cited and relied on decisions of that state, without proof. While courts of one state will not take judicial notice of the laws of another, written or unwritten, the opinions of the court of last resort of another in construing its statutes may properly be referred to, and are entitled to very great weight. *Eastern Building & Loan Ass'n v. Williamson*, 189 U. S. 122 (47 L. Ed. 735). These decisions are followed in construing the statutes because of the apparent acquiescence of counsel, as well as our own concurrence, in their soundness.—REVERSED.

J. WRAGG & SON, Appellants, v. OLIVER W. MEAD, Appellee.

Breach of Contract: DAMAGES. In an action for a breach of contract, such damages are recoverable as are the natural and proximate consequence of the breach or may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made.

Covenant Against Incumbrances: BREACH OF: MEASURE OF DAMAGES. In an action on a covenant against incumbrances, where the breach is an outstanding lease of the premises, the measure of damages is the rental value of the land for the unexpired term of the lease.

Damages: REMOTE AND SPECULATIVE. Where there is an outstanding lease on property conveyed with a covenant against incumbrances, the fact that the vendor knew the property was to be used by the purchaser for the storage of goods will not impose on him a liability in damages for sums paid by the

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126 88

purchaser during the continuance of the lease in hauling his goods a considerable distance for storage, such damages being too remote and not within the contemplation of the parties.

Appeal from Polk District Court.—HON. O. A. BISHOP,
Judge.

WEDNESDAY, MAY 13, 1903.

ACTION for damages for breach of covenants in a conveyance of real estate. Judgment for defendant, and plaintiffs appeal.—*Affirmed.*

W. G. Harvison for appellants.

Dudley & Coffin and *White & Clarke* for appellees.

WEAVER, J.—Defendant conveyed to plaintiffs by warranty deed a tract of land in the town of Waukee. Plaintiffs were then engaged in the nursery business two miles from Waukee, and allege that they bought the land to be used as a place of storage for the nursery stock shipped to them from other dealers, which stock was to be resold and shipped to their customers over the railroads passing through that town. The use to which the property was to be put, it is further alleged, was made known to defendant before the purchase was consummated. It appears, however, that prior to the conveyance defendant had leased the land for a year to one Carter, who refused to yield to plaintiffs. Defendant claims to have forgotten the fact of the lease until after the deed was made, but on the next day it is conceded he went to plaintiffs and informed them of the oversight, and tried to adjust the matter, but failed in his effort so to do. Later plaintiffs attempted to get possession of the premises, but were ejected by Carter by legal proceedings, of which defendant had notice. The only evidence offered upon the claim of damages is to the effect that, by reason of the failure

to secure possession of the land as a place of storage, plaintiffs were obliged to haul all nursery stock received by them during the season to their home nursery, two miles distant, and haul the same back again to the railroad station as shipments were required to meet the demands of their trade, and the extra expense and cost thus necessarily incurred amounted to \$585. The district court ruled that such damages were too remote to support a recovery, and sustained defendant's motion to strike the testimony. There being no other evidence of damage offered, the cause was taken from the jury, and judgment entered against plaintiffs for costs.

The correctness of this ruling of the trial court is the only question presented by the appeal. That damages which are the natural and proximate consequence of the
1. BREACH of contract: damages. breach of a contract, or are such as may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable consequence of the breach of it, may be recovered from the party in default, is a general rule approved by a multitude of authorities. Frequent difficulty has been found, however, in the application of this principle, and the cases are sometimes in apparent conflict. In the case before us appellants rely chiefly upon the latter phase of the rule cited, insisting that, as appellee was informed of the use to which appellants proposed to put the premises, the parties must have contemplated that damages of the kind claimed would be sustained by the purchasers in the event possession could not be promptly given. The proposition is not sound. The breach of which appellants complain is the existence of an outstanding lease of the premises conveyed. The injury directly and naturally resulting from such breach is the loss of the use or possession of the premises for one year; and it follows of necessity that, generally speaking,

the measure of damages is the value of the thing lost—the value of the use of the premises for the period during which the grantees have been excluded therefrom.

It is the appellee's covenant against incumbrances which has been broken, and the law fixing the measure of damages in such cases is well settled. See *Van Wagner v.*

Van Nostrand, 19 Iowa, 422, and *Guthrie v. Russell*, 46 Iowa, 269, and cases hereinafter cited. In an action upon a covenant against incumbrances, where the breach alleged is an outstanding lease of the premises conveyed, the measure of damages is the rental value of the land for the unexpired term. *Alexander v. Bishop*, 59 Iowa, 572; *Clark v. Fisher*, 54 Kan. 403 (38 Pac. Rep. 493); *Edward v. Clark*, 83 Mich. 246 (47 N. W. Rep. 112, 10 L. R. A. 659); *Fritz v. Pusey*, 31 Minn. 368 (18 N. W. Rep. 94); *Porter v. Bradley*, 7 R. I. 538; *Moreland v. Metz*, 24 W. Va. 119 (49 Am. Rep. 246); *Rickert v. Snyder*, 9 Wend. 416; *Christy v. Ogle*, 33 Ill. 295; *Wetherbee v. Bennett*, 2 Allen, 428.

Assuming then, that the general rule is as laid down in these authorities—and we find none to the contrary—does the fact of appellee's knowledge of the intended use of the premises have the effect to except the case at bar from its operation? The information given appellee was that plaintiffs intended to use the land for the storage of nursery stock. With that fact in mind when he conveyed the land, defendant may properly be held to have contemplated that a loss of the possession for a year would be an injury or damage to appellants to the rental value of such premises for the special purpose to which it was intended to devote them, and if such sum was greater than the rental value for general or ordinary purposes he could have no right to complain. This was the utmost extent of his liability. But no evidence was introduced

2. COVENANT
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3. DAMAGES:
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or offered tending to show the value of the use of the land for this or any other purposes. The cost or expense of hauling the stock from the railroad station to the appellants' nursery and back again was contingent, remote, and not the natural or immediate result of the breach of appellee's covenant. So far as shown, appellants simply continued to carry on their business as they had been doing for years. It cannot be presumed that this land afforded the only convenient opportunity in or about Waukee to store and keep their stock. If instead of two miles appellant's nursery had been ten or twenty miles distant, and they saw fit to haul their stock home at an expense of \$1,000 or \$1,500, could it reasonably be said that the parties contemplated the possibility of such stupendous damages arising from the loss of a year's use of a small tract of land sold at a valuation of \$800? Or, if the outstanding lease had proved to be for a term of five or ten years instead of one year, could appellants expect to continue this excessive expenditure and recover it again from their grantor? It would seem a self-evident proposition that such damages are neither the direct, natural, or proximate consequence of the breach of the appellee's covenant against incumbrances, and are too remote and unusual, not to say unreasonable, to have been within the contemplation of the parties to the transaction.

The appellants' claim comes within the class disapproved by this court in *Prosser v. Jones*, 41 Iowa, 674; *Miehills M. Co. v. Day*, 50 Iowa, 252; *Rich v. Bloch*, 68 Iowa, 526. See, also, *Candy v. Candy*, 10 Hun, 88; *Lovejoy v. Morrison*, 10 Minn. 136 (Gil. 108); *O'Conner v. Nolan*, 64 Ill. App. 357; *Gunter v. Beard*, 93 Ala. 227, (9 South. Rep. 389.)

It may be admitted that if appellants, on the strength of their purchase of the land, and before learning of the existence of the lease, had expended money or labor in preparing to go into possession, and such expense was ren-

dered unavailing by the refusal of the tenant to vacate, they would be in a position to demand a recovery of the special damages thus sustained. But no such case is made. The sole item of damage claimed is the alleged expense incurred in hauling the nursery stock, and for this no right of action existed.

The judgment of the district court was right, and is **AFFIRMED.**

THE MERCANTILE REALTY COMPANY, Appellants, v. A. L. STETSON AND W. C. DAVENPORT, Sheriff, Appellees.

Mortgage Foreclosure: ATTACHMENT: INVALIDITY OF AS DEFENSE.

- 1 In a suit to foreclose a mortgage, where the mortgagee levies an attachment and the mortgagor pleads a counterclaim in defense, a subsequent owner deriving title from the mortgagor cannot set up the invalidity of the attachment levy against the mortgagee.

Receiver: FILING OF CLAIM: ESTOPPEL. Where a mortgagee com-

- 2 mences foreclosure of his mortgage, issuing an attachment, and afterward a receiver of the mortgaged property is appointed and makes application for an order to sell subject to the mortgages to which such mortgagee appears, and before an order of sale is granted he files his claim with the receiver, which is disallowed, but an order is granted authorizing an appeal therefrom, the mortgagee thereby elects to rely on his claim against the receiver and is estopped from proceeding against the property on a judgment of foreclosure of his mortgage.

Appeal from Woodbury District Court.—HON. GEO. W. WAKEFIELD, Judge.

WEDNESDAY, MAY 13, 1903.

SUIT in equity to enjoin defendants from selling a large amount of real estate in Sioux City, Iowa, under a special execution issued on a judgment rendered by the district court of Woodbury county, Iowa, in an action wherein A. L. Stetson was plaintiff, and the Northern

Investment Company, the then owner of the property, was defendant. The injunction was asked upon three grounds: first, because the attachment issued in the main suit was never levied on the property; second, because defendant Stetson is estopped by record from enforcing his attachment; and, third, because of an estoppel *in pais*. The trial court dismissed plaintiff's petition, and plaintiff appeals.—*Reversed*.

Milchrist & Scott for appellant.

Shull & Farnsworth for appellees.

DEEMER, J.—The property which defendants were about to sell on special execution at one time belonged to the Northern Investment Company, a corporation organized under the laws of the state of Kentucky. It was incumbered by mortgages amounting in the aggregate to about \$400,000. On or about April 13, 1895, defendant Stetson commenced action to foreclose one of these mortgages, for something like \$23,000, and in said action caused a writ of attachment to issue, which it is claimed was levied upon the property in controversy. Two days prior to that, and on the 11th day of April, one Harrison brought suit in the Woodbury district court against the investment company and Stetson to foreclose a mortgage upon the property for something like \$100,000. On May 16, 1895, an order was made in this last mentioned case appointing one Black a general receiver of all the property in controversy. Black took possession of the property, collected rents, paid taxes, and interest on mortgages, made repairs, and otherwise cared for and managed the property, until December 12th of that year, when he resigned, whereupon C. D. Foster was appointed in his stead. Foster continued to manage and care for the property and during his management advanced about \$9,000 in payment of interests, taxes, etc., part of which he had borrowed, and the remainder he

advanced from his own funds. On August 3, 1896, he filed in the district court an application for authority to sell the real estate in controversy, subject to the mortgage and tax liens. This application came on for hearing on September 1st. Defendant Stetson appeared thereto by his attorneys, and asked for a continuance until the next day, which was granted. After a full hearing, and on the 19th day of September, 1896, the court made an order authorizing the receiver to sell the property for cash, subject to all mortgages thereon; said sale to be at auction and without redemption. The order for the sale was presented to Messrs. Shull & Farnsworth, who were Stetson's attorneys, and they indorsed thereon: "O. K. Shull and Farnsworth." A few days prior to the order for the sale, Stetson recovered judgment in his attachment case, and the decree provided that the attached property should be sold as required by law. Shortly before this decree and judgment was rendered, and on the 8th day of September, 1896, Stetson filed a claim based thereon with the receiver, and asked that it be established as a claim against the property of the Northern Investment Company. Upon submission of the claim to the district court, the following order was made: "Now, to wit, on this 17th day of September, 1896, the report of C. D. Foster, as receiver, as to the claims filed with him, is submitted, and the court, having received said report, finds that all of the claims therein reported should be allowed as general claims, except the one in favor of A. L. Stetson, and that, as to that claim, he be authorized and directed to take an appeal to the Supreme Court of Iowa from the decree rendered upon which said claim is based, and that hearing upon said report as to said claim shall be continued, to which said order and ruling the said A. L. Stetson excepts." On September 26, 1896, the receiver sold the property in controversy, after due notice, to the plaintiff herein, a corporation organized under the laws of this

state, for the aggregate sum of \$5,500, which was the highest and best bid therefor. One of Stetson's attorneys attended the sale, but made no objection thereto. The sale was reported to the court and duly approved, and a receiver's deed was executed, conveying the property to the plaintiff. Thereafter Stetson caused a special execution to issue on his judgment against the Northern Investment Company, which was levied on the property in controversy, and under which it was advertised to be sold, when this action was brought to restrain the sale.

Counsel first discuss the question as to whether or not there was any valid levy of the Stetson attachment on the real estate in controversy. They claim that no notice of

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defense. the levy was served upon the tenants in possession when the attachment was levied.

This question seems to be settled adversely to them in *Foster v. Davenport*, 109 Iowa, 329. True, that action involved personal property only, but there was but one attachment, which was levied on real and personal property at one and the same time; and the defects, if there were any applied to the levies on both real and personal property. Moreover, the case in which the levy was made came to this court on appeal, and was here affirmed. *Stetson v. Northern Investment Co.*, 104 Iowa, 393. No question was made in that case of the validity of the levy. Another cogent and unanswerable reason why plaintiff may not assert the invalidity of the levy is found in the fact that in the original case the defendant Northern Investment Company filed a counterclaim against Stetson. See 104 Iowa, 393. Plaintiff is a purchaser deriving its title to the property from the Northern Investment Company, and, under the facts above recited, we think it clear that it cannot plead the invalidity of the attachment. *Schoonover v. Osborne*, 108 Iowa, 453; *Wright v. Mahaffey*, 76 Iowa, 96; *Baxter v. Myers*, 85 Iowa, 328. We are not to be understood as holding that the validity of the

attachment on the real estate has in fact been expressly adjudicated in any preceding case. All that we hold is that plaintiff, under the facts above recited, is not entitled to question it. The Northern Investment Company was content to treat the levy as valid, and, under the facts disclosed by this record, plaintiff should not be permitted to plead the invalidity thereof.

II. The next question for consideration is the alleged estoppel of record. A. L. Stetson was made a defendant in the Harrison foreclosure case, in which a receiver was appointed for the property. Not only so, but he voluntarily filed his claim, on which he afterward obtained judgment, with the receivers. This claim was not allowed by the court, but the receivers were authorized and directed to appeal from the decree in which the judgment was rendered, and the hearing on the report as to that claim was continued. No appeal was ever taken, as we understand it, from the order authorizing the receivers to appeal, and continuing the hearing on Stetson's claim, which had been filed with the receivers. Foster, as receiver, made application in August of the year 1896 to sell the property held by him as receiver, and hearing of this application was set for September 1st. On the last named date, Stetson appeared by attorneys, and asked for and secured a continuance, which was granted. The hearing on Stetson's claim filed with the receiver was on the 17th day of September, and, as we have seen, the receiver was authorized to take an appeal from the judgment obtained by Stetson, and the further hearing of his claim was continued. On the 19th day of September the application of the receiver for authority to sell was submitted, and sustained in the following language: "It is therefore ordered that said receiver be, and he is hereby, authorized, empowered, and directed to sell the real estate of the Northern Investment Company and its trustees at public auction, for cash, subject to

2. RECEIVERS:
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the mortgages thereon, and without right of redemption; * * * all sales to be made subject to the approval of the court." Stetson did not appeal from this order, and the property was accordingly sold by the receiver on September 25th, subject to the mortgages thereon, to the plaintiff herein, for \$5,500. The order for the sale of the property was submitted to Shull & Farnsworth, and they indorsed it: "O. K. Shull and Farnsworth."

It is manifest from this statement that Stetson was not only a party to the original Harrison foreclosure, but that he filed his claim with the receiver, appeared to the application for the sale of the real estate, and apparently by and through his attorneys, approved the order. It should be said, in fairness to these attorneys, however, that they claim they did not O. K. it as attorneys for Stetson, but in their individual capacity; they having some individual claims with the receiver. It is also clear that the order was for a sale subject only to mortgages existing against the property. As Stetson's attachment was levied prior to the appointment of the receiver, his lien is prior to any claim under the receivership proceedings, and he (Stetson) is not concluded thereby, unless by reason of being a party to the case in which the order for the sale was made. Appellees say that, by reason of the disallowance of Stetson's claim on the hearing of the receiver's report, he (Stetson) was out of the case, and was not bound by any further proceedings therein; but it will be observed that the claim was not entirely disallowed. The receiver was authorized to appeal from the judgment allowing the claim, and the hearing upon the report as to such claim was continued. The receiver did appeal the case, and it was affirmed in this court. See case of *Stetson v. Northern Investment Co.*, hitherto cited. The argument is that, from the time of the making of this order, Stetson was out of the receivership matter and paid no further attention to it. It may be that he in fact gave it no further

attention. But he nevertheless was a party to the case from the beginning, appeared to the application for the sale, and secured a continuance of the application; and, if he failed to follow it up, it was his own fault. His claim before the receiver was merely continued, and he was in no manner dismissed from the case. It was his duty to protect his rights while his claim was pending. He was still in court, and, we think, bound by all subsequent orders made in the case—particularly the order made on the application to sell, to which he unquestionably appeared. His appearance to this application was never withdrawn, if, indeed, it could have been, and it does not lie in his mouth to say that he is not bound by what was subsequently ordered. The order to sell was within the jurisdiction of the court, and appearance to the application gave jurisdiction of the person.

But it is said that the sale was made to pay loans made to and advances by the receiver; that Stetson was not a party to the case when these claims were established, and is not bound thereby. This is beside the issues in the case. There is no controversy here over the division of the proceeds of the sale. The only question now before us is the effect and binding force of the receiver's sale. The question of division of the proceeds is not for adjudication at this time. Hence we have no occasion to consider the matter of priorities. If Stetson was such a party to the application to sell as to be bound by it, he cannot now collaterally attack the order on the ground that proper priorities were not preserved, or that the showing therefor was not sufficient to justify the order. If Stetson was not a party to the order of sale, so as to be bound thereby, then, of course, his attachment lien would not be affected by the order. But he was, we think, a party both to the original case and to the application for the order, and he is bound by the terms thereof. Of course, the receiver's possession was subject to all valid and existing liens; but

when Stetson filed his claim with the receiver, and appeared to the application to sell, he elected to rely on appropriate orders for the distribution of the proceeds of the sale, rather than upon his attachment lien, and is bound by his election. *Garner v. Fry*, 104 Iowa, 515.

Further, it is claimed that on September 18, 1896, the district court found in Stetson's original case, which was against the trustees and the receivers of the Northern Investment Company that he (Stetson) was entitled to have the property sold on special execution to pay his judgment. The difficulty with this lies in two facts: First. Stetson's claim filed with the receivers on September 8, 1896, read in this wise: "Due on decree ordered but not yet filed in the district court of Iowa in and for Woodbury county upon the foreclosure of the mortgage on lots 4, 5, and 6, block 26, Middle Sioux City, with an order for the sale of mortgaged property, \$25,531.11 and costs." He thus elected to give the court appointing the receivers jurisdiction of his claim whenever it should be established in the main case. Second. Stetson appeared to the order approving the sale on September 25th, or, if we be wrong in this statement, the order for the sale which we find was binding on Stetson was made on the 19th, after Stetson had obtained his judgment and order for the sale of the attached property. Moreover, an appeal was taken from that judgment, which, as we have said, was finally settled in this court.

Again, it is argued that plaintiff is nothing more than a reorganized Northern Investment Company, but this claim is not sustained by the record. It is an independent entity, and as much entitled to protection as if it had been a separate person. The order for the sale was that it should be made without redemption, and subject to the mortgages on the separate tracts. This impliedly, at least, negatived all other liens. That the court had power to direct such sale, see *First National Bank v. Shedd*, 121 U. S. 74 (7

Sup. Ct. Rep. 807; 30 L. Ed. 877); Beach on Receivers, sections 818, 820; American & English Ency. of Law (1st Ed.) 145 *et seq.*; *O'Neil v. Van Tassel*, 137 N. Y. 297 (88 N. E. Rep. 814). A purchaser of property at such a sale as was here had looks to the decree or order for the measure of his rights. It is his muniment of title. The decree is the contract made with him, and should not be changed after he has purchased, relying thereon. When one is invited to buy upon the faith of a record, and expends his money in reliance on the integrity thereof, he should be protected. *Central Co. v. Railway* (C. C.) 80 Fed. Rep. 385.

We are constrained to hold that the defendant Stetson was bound by the order made for the sale; that he elected to rely on his remedies against the receivers, instead of on his attachment; and that plaintiff is entitled to protection. Reaching this conclusion, there is no necessity for considering the question of estoppel *in pais*.

The judgment and decree must be reversed, and, at plaintiff's option, it may have a decree in this court permanently enjoining the sale of the property on execution, or the case may be remanded to the district court for a decree in harmony with this opinion.—REVERSED.

JAMES BELL, Administrator, Appellee, v. INCORPORATED
TOWN OF CLARION, Appellant.

Withdrawal of Evidence. The discretion of a trial court in permitting the withdrawal of evidence will not be interfered with in the absence of a showing of abuse.

Withdrawal of Evidence: PREJUDICE: NEW TRIAL. Upon the trial plaintiff offered in evidence a transcript of the testimony of certain witnesses on a former trial, which was withdrawn, and the same witnesses were examined on the same subject in open court. *Held*, it appearing that defendant was not prejudiced thereby it was not error to refuse to discharge the jury and grant a new trial.

Verdict Held not Excessive. Deceased died as the result of injuries received from a loose plank in a sidewalk about seven months after the injury, during which time she suffered great pain and at times had convulsions. *Held*, that a verdict for \$3500 was not excessive.

Appeal from Wright District Court.—HON. J. R. WHITAKER, Judge.

WEDNESDAY, MAY 18, 1903.

THIS action was commenced by Eliza Bell to recover damages for a personal injury received upon a sidewalk in the defendant town. Said Eliza Bell having died before the cause was reached for trial, her husband, James Bell, was appointed administrator of her estate, and substituted as plaintiff. Upon a former trial there was a verdict and judgment in favor of plaintiff, which on appeal to this court was reversed, and the cause remanded for a new trial. For the opinion on such former appeal, see 118 Iowa, 126. Upon the present trial the plaintiff again secured a verdict in the sum of \$3,500, and judgment was entered thereon. The defendant appeals.—*Affirmed*.

Nagle & Nagle and *Birdsall & Birdsall* for appellant.

Peterson & Humphrey and *W. D. Evans* for appellee.

BISHOP, C. J.—The trial began on April 23, 1901. Preceding this, and on April 8, 1901, notice in writing was served upon the defendant to the effect that, upon the trial, plaintiff would offer in evidence, as depositions, translations of the shorthand notes of the evidence of each and all the witnesses who had testified on behalf of plaintiff on the former trial. During the trial, plaintiff called as a witness the shorthand reporter who took the evidence on the former trial, and he produced and identified his certified transcript of such evidence. Thereupon, and in

addition to other evidence offered and introduced, plaintiff offered to read and introduce in evidence the testimony of a witness appearing in such transcript. To this, defendant objected as incompetent, and because no sufficient grounds had been shown to authorize the same. The objection was overruled and the evidence read to the jury. This was followed by an offer to read from said transcript the evidence of eight other witnesses. A similar objection was made to each, and overruled, and the evidence was read to the jury. It appears from the abstract before us that the evidence so read had relation wholly to the condition of the sidewalk at and near the place where Mrs. Bell is said to have been injured, and at and prior to the time of her injury. Having made such record, counsel for plaintiff made the statement to the court that they desired to avoid any question as to the admissibility of the transcript evidence; that they had subpoenaed the respective witnesses, and therefore they consented that such transcript evidence might be ruled out. Thereupon the court, over the objection of defendant, instructed the jury that all the evidence so read was withdrawn by the plaintiff, and that such evidence was not to be considered by them. Plaintiff then asked to be allowed to introduce the witnesses in person. Thereupon defendant objected to proceeding further with the trial before the present jury, assigning as a reason that such jury had listened to the evidence read, and the order of the court could not remove such evidence from their minds so as to enable them to now remember the testimony of the same or other witnesses without being influenced by the testimony so read, and that it would be prejudicial to defendant to permit the trial to proceed under such circumstances. This objection was overruled. The plaintiff then called and examined five of the witnesses whose testimony had been so previously read. No objection was made to any of such witnesses or to their testimony.

A careful reading of the record discloses that the testimony of the witnesses, as read from the transcript, was, to all intents and purposes, indetical with that given by them when subsequently called to the witness stand. Manifestly, the objection of defendant to the withdrawal of the transcript evidence was without force. Ordinarily the right of a party to an action to thus proceed is not subject to question. There may be cases where prejudice to the other party would result from such a course, by reason of the character of the evidence itself, but such is not claimed in the case before us. The evidence was all objected to by defendant when offered, and the objection to the withdrawal thereof was a general one, and, at best, can be considered only as addressed to the mere fact of withdrawal. In any event, the whole matter was within the discretionary powers of the court, and therewith we do not interfere save in cases of abuse. Such does not appear from the present record. A citation of authorities is not demanded, but see *State v. Helm*, 97 Iowa, 378; *Shepard v. Railway*, 77 Iowa, 54; *Keyes v. Cedar Rapids*, 107 Iowa, 509; *Aultman, M. & Co. v. Roemer*, 112 Iowa, 652.

We have, then, as presenting the real question for review, the ruling of the court upon the request of defendant for the discharge of the jury, and a retrial of the action before another jury. Here too, the whole matter was within the discretionary powers of the court, and the question is to be determined by us in the light of such fact. Now, as we have already stated, the testimony read from the transcript had relation only to the condition of the sidewalk, and the testimony given by the witnesses upon the stand was confined to that subject. In no material respect did the testimony given in the one instance vary from that given in the other. At the time the ruling was made, the court, in explicit terms, directed the jury to disregard the

1. WITHDRAWAL
of evidence.

2. WITHDRAWAL
of evidence:
prejudice:
new trial.

evidence stricken out. Again, in connection with the general charge, the court covered the whole ground by giving to the jury a special instruction in relation thereto; and this in clear, positive language. We think no room was left for a misunderstanding on the part of the jury, and, taking into consideration the character of the evidence and its relation to the questions at issue, we also think it improbable that any confusion in the minds of the jurors resulted from the proceedings so had. Had the testimony, as given from the witness stand, been different in any material sense from that given upon the former trial, or if the subject-matter of such evidence was confusing or involved intricacies, or if in itself and for any reason it was improper and prejudicial in character, it might be justice would require that a new trial be granted. Involving some such conditions are the cases cited and relied upon by appellant. But in the instant case no such condition is presented. In the case of *State v. Helm, supra*, it is said: "It is to be remembered that it is the general rule that evidence improperly admitted may be withdrawn from the jury, and the error thus cured. This court has many times so held. We need not cite the cases. In the trial of jury cases the court is required to pass upon the admissibility of evidence without time for much deliberation, and when an error occurs, and soon after a correction is made, the proper administration of justice does not require, unless it may be in extreme cases, that the court should grant a new trial because of the error." Accepting this to be the correct rule, we readily reach the conclusion that there was no abuse of discretion in proceeding with the trial under the circumstances appearing.

II. We have examined the instructions complained of, and think they were applicable to the case as made by the evidence, and in them we find no error. So, too, there was no error in refusing the request for instruction number 8. The subject of contributory negligence was fully covered,

and in apt language, in the instructions given, and we think the law was stated as favorably to defendant as it could in reason expect. The request for instruction number 2 was also properly refused. The subject-matter thereof was correctly presented to the jury by an instruction given by the court.

III. Finally it is said that the verdict was clearly excessive and the result of passion and prejudice. Mrs. Bell was injured July 1, 1897. Her injury was caused by stepping upon one end of a loose board, the other end flying up and striking her in the face, and resulting in a fracture of the nasal and other bones in the back part of the nose and in the lower part of the skull. She died as a result of such injury, February 12, 1898. Her sufferings in the meantime are described as constant and intense, and involved not only her head, but other portions of her body. During a considerable period she had violent convulsions, requiring the combined efforts of several persons to confine her to her bed. The details are more or less distressing, and need not be rehearsed. The amount of the recovery was confided to the sound discretion of the jury, and we do not regard the sum awarded so far unwarranted as to justify us in interfering.

On the whole, we think the judgment should be, and it is **AFFIRMED**.

WEAVER, J., taking no part.

JOSEPH KIRSHER *et al.*, v. JACOB KIRSHER *et al.*. Appellants.

Wills: **TESTAMENTARY CAPACITY: PRESUMPTION.** The law does not
1 presume from the mere fact that immediately following a stroke of apoplexy testator was mentally incompetent that this condition continued and existed at the time of making his will some two years later.

VOL. 120 IOWA.—22.

120	337
121	135
122	93

120	337
125	342
125	749
120	337
127	662

120	337
133	706

120	337
134	310

120	337
137	619

120	337
143	82
143	498

Expert Testimony: INSTRUCTION. The value of expert testimony
2 in response to hypothetical questions depends solely upon the
truth of the facts on which they are based, and if the facts
are not as stated in the questions the answers cannot be con-
sidered at all, and an instruction which permits the considera-
tion of expert testimony without regard to this rule is erroneous.

Instructions. If a party desires a more explicit instruction than
3 that given, he should request it.

Withdrawal of Evidence. Where an issue is withdrawn from the
4 jury it is not necessary to also withdraw the evidence on the
subject.

Personal Transaction. The testimony of a daughter as to what she
5 did with her personal earnings during her father's lifetime is
not objectionable as relating to a personal transaction with
deceased.

Non-expert Opinion. A witness who has seen and observed the de-
6 ceased, may, after giving the facts upon which he bases his
opinion, state that "he was insane".

Evidence: VALUE OF. The fact that a physician in testifying to
7 the insanity of testator was mistaken as to the time he treated
him merely affects the value of his testimony.

Hypothetical Questions. Hypothetical questions need only be based
8 on what the evidence substantially shows.

Taxation of Costs. In an action to set aside the probate of a will,
9 all parties being children of deceased and contestants being
successful, there was no error in taxing the court costs to the
estate, the attorneys' fees to be paid by the parties.

Setting Will Aside. The probate of a will may be set aside in a
10 law action.

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

WEDNESDAY, MAY 13, 1903.

PETER Kirsher died in August, 1897, leaving a written
instrument purporting to be his will. It was duly exe-
cuted, and was probated as his will on the 27th day of
October, 1897. On the 31st day of August, 1898, this
action was brought to set aside the probate proceedings,

and to declare that said instrument was not the will of said Kirsher, because it was procured by fraud and undue influence, and because of his mental incapacity to make a valid will. It was also alleged that the instrument was not properly executed. The case was tried to a jury, and, after the evidence was all in, the court withdrew from the consideration of the jury the issues as to fraud and undue influence, and as to the execution of the instrument, and submitted the case on the issue as to the mental capacity of Kirsher. The jury found for the contestants, and a judgment was rendered on the verdict. The defendants appeal. The costs were taxed to the estate, and from that order the plaintiffs appeal. The defendants will be designated as appellants.—*Affirmed* on plaintiffs appeal, and *reversed* on that of defendants.

Dale & Harvison and *Connor & Weaver* for appellants.

J. W. Near and *Reed & Read* for appellees.

SHERWIN, J.—The evidence is voluminous, and an attempt to set forth in detail sufficient thereof to show its trend in support of the adverse claims of the parties hereto would extend this opinion beyond any length profitable to the profession or to the parties. All of the parties to the action are children of the deceased—his wife having died before he did—and the testimony as to their father's physical and mental condition during the period of his life material to the question before us is in conflict. We have given the entire record the care which the importance of the litigation demands, and reach the conclusion that the verdict has such support in the evidence that we should not say, as a matter of law, that it is wrong.

The will in question was executed on the 18th day of June, 1897—a little over four months before Mr. Kirsher's death. He was then past eighty years of age, and physically weak. For many years prior thereto, and prior

to 1894, he had been totally blind. On the 11th day of July, 1894, he suffered a stroke of apoplexy, and was treated therefor by Dr. Henry Matter, who testified that when he reached him, soon after the attack, Mr. Kirsher knew him, and was able to, and did, talk intelligently with him and others. Dr. Matter also testified that he did not consider the stroke a severe one, and that Mr. Kirsher partially recovered therefrom, though never enough so to walk without help. There is but little conflict in the testimony as to Mr. Kirsher's physical condition after the stroke, but the contestants claim that it was immediately followed by senile dementia which continued until his death. It may be said in this connection, however, that the contestants' witnesses are not agreed as to the duration of the effect of the stroke upon the deceased, though there is testimony supporting the contestants' theory. On the other hand, the decided weight of the testimony, as we view it, shows that no general or settled mental disability was caused by the stroke, or followed it. On this branch of the case the court gave this instruction:

"If, considering as directed in instruction No. 7—the last preceding instruction—you have found that the said Peter Kirsher at any time prior to the date of the execution of said will was of unsound mind, then his mental unsoundness is presumed to continue, unless a recovery or restoration is shown, and the burden is upon the defendants to show such recovery, and that at the very time of the execution of the instrument in question the said Peter Kirsher was of sound mind, as elsewhere defined in these instructions. If you find by a preponderance of the evidence that the said Peter Kirsher for a longer or shorter time before the execution of the will was of unsound mind, yet, if you further find by a preponderance of the evidence that at the very time of the execution of the will the said Peter Kirsher was of sound mind, then your verdict will be for the defendants. But if you find, as hereinbefore

instructed, that at the time of the execution of the will the said Peter Kirsher was of unsound mind, then your verdict will be for the plaintiffs."

Instruction 7, referred to in the foregoing paragraph, was a general one, directing the jury what might be considered in determining the mental condition of the deceased at the time the will was executed, and instructing as to the weight of the testimony.

Primarily, every person is presumed to be sane until the contrary is proved, and the burden of proof of insanity rests in the first instance upon the party alleging it. It is equally as true that, when settled and general unsoundness of mind is proved, a presumption arises in favor of its continued existence. *Corbit v. Smith*, 7 Iowa, 65; *Blake v. Rourke*, 74 Iowa, 523; *Bever v. Spangler*, 93 Iowa, 601. But this court has never held (and, so far as we have examined the cases, no other) that proof of insanity at a stated period, without reference to the particular circumstances connected therewith, is sufficient to authorize the inference of insanity at a remote subsequent period. Temporary mental aberration is not uncommon, and the causes thereof are numerous, among which, science and observation have taught us, are all forms of violent disease, including apoplexy. In *Trish v. Newell*, 62 Ill. 196 (14 Am. Rep. 79), it is said, "It is no more a presumption of law that one rendered unconscious and incapable of mental action by a stroke of paralysis will continue so for four months thereafter, than that he would if the same effect was produced by a blow on the head." The instruction given failed to recognize the distinction we have pointed out, and permitted the jury to infer insanity at the time the will was executed from the testator's mental condition immediately following the stroke, and without requiring it to find that there was then a settled condition of mental unsoundness. In other words, the jury was told that if it

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found mental unsoundness two years before, whether habitual or temporary, it could presume that Mr. Kirsher was insane when he executed his will. That such is not the rule is held by our own cases *supra*, and by the weight of authority. Buswell on Insanity, 213. Lawson on Presumptive Evidence, 179.

The court gave the following instruction: "A number of physicians have been called as medical experts; that is, they have given their opinions, based upon hypothetical questions put to them. You will
^{2. EXPERT testimony: instruction.} carefully consider this testimony, and give it the weight you may think it justly entitled to. The weight and value of such testimony depends upon whether the statements of facts, of which such experts have not personal knowledge, but which they accept as true for the purposes of answering the question propounded them, are in material and important particulars correct, fair, and impartial, then such testimony may [be of great value, but if you find such statements of facts are in material and important particulars incorrect, unfair, partial, and untrue, then you should attach little or no weight to such testimony." It hardly needs the citation of authority to show that this instruction is erroneous. The practical experience of lawyers and courts has so often demonstrated the fact that a very slight change in the hypothesis will change completely the answer of an expert witness, that it is unnecessary to say that the value of answers to such questions must be based solely upon the truth of the facts upon which they are based, and that, if the facts are not found to be as stated, the answers are of no value, and cannot be considered at all. *Hall v. Rankin*, 87 Iowa, 264; Schouler on Wills (8d Ed.) section 207. If the instruction had not said that "little or no weight should be given to the testimony if the hypothesis were found untrue," it might be said that the jury would understand that it was not to consider answers to such question, under

the rule stated in *Bever v. Spangler, supra*, where no instruction on the subject was given. But the language here, by implication, at least, authorized the consideration of the testimony of the experts in any event.

The instructions given as to the weight of the testimony and the credibility of the witnesses were without error, and, in a general way, covered the questions. If

the defendants desired more specific ones
3. INSTRUCTION. touching any phase of the case, they should have asked them.

The issue of undue influence was withdrawn by an instruction, and it was not necessary to state further that the evidence on that subject was also withdrawn. The

jury understood that as well without further
4. WITHDRAWAL of evidence. direction as it would had a volume been written on the subject.

We doubt whether Dr. Moenck was in any proper sense so connected with the deceased as to become his physician, within the meaning of section 4608 of the Code; but, if he was his testimony was competent. *Winters v. Winters*, 102 Iowa, 58. The weight to be given his testimony, under the circumstances, was a matter for the jury to determine.

It is claimed that much of the testimony, given by the plaintiffs themselves was incompetent, under Code, section 4604. Without calling specific attention to each witness against whom the objection is made, or reciting the testimony objected to, we may say that we find no serious error in any of the rulings. It is, perhaps, strange that witnesses could testify that the deceased did not recognize them or seem to know them, when he was totally blind and hence could not see them, and when, as they say, they had no conversation with him; but the court cannot say, as a matter of law, that the witnesses had conversations with the deceased at the time in question, when they all testify that they did not. It was for the jury to say

whether, under the facts stated, the deceased did or did not, or could or could not, recognize them. *Denning v. Butcher*, 91 Iowa, 425.

Objection was made to answers of Mary Pontious as to what she did with her personal earnings during her father's life. The answers were competent, under the rule in *McElhenney v. Hendricks*, 82 Iowa, 659.

There was no error in admitting the testimony of Edwards. He had seen and observed the deceased on different occasions during the time it is claimed he was insane, and, after stating the facts connected therewith, was permitted to say that he thought "he was not of sound mind." *In re Fenton's Will*, 97 Iowa, 193.

Dr. Burkhart, who at one time had been the family physician of the deceased, testified that he attended him as such up until February, 1894; that from 1892 until that time he was physically and mentally weak, and became worse all of the time. He detailed facts on which he partially based his conclusion, and was then permitted to testify that when he last treated him he thought he was "unsound in his mind." This testimony was competent, and its weight for the jury. The doctor was evidently mistaken about treating Mr. Kirsher for a stroke of paralysis in 1892, or at any other time, but this only affected the value of his testimony.

The hypothetical questions put to the expert witnesses were substantially in accord with the well-settled rule. They need only be based upon what the evidence tends to prove, and they need not cover all of that. A careful examination of the questions and evidence shows that the various elements of the questions are supported by the evidence.

The court taxed all of the costs, except attorney's fees, to the estate, and the appellants complain because their

attorney's fees were not so taxed, while the contestants complain because the other costs were so taxed. We shall not disturb the order, however. As we have heretofore said, all of the parties to this litigation are children of the deceased. The property was substantially all given to the defendants by the will, which was duly executed, and admitted to probate, after due notice, without objection or question. It was thereby determined that it was the valid last will and testament of the deceased, and until the order was set aside it was conclusive upon all parties. When this action was commenced to determine the true character of the will, it may be presumed, at least, that the proponents were acting in good faith in defending, and with no other object in view than to settle that question according to the very right of the matter. If this is true, there is no reason apparent to us why the estate should not bear the reasonable court expense incident to such a trial. There is certainly no impropriety in attempting to uphold what is in good faith believed to be a valid will, and to tax the costs to the defendants for so doing would be to punish them unjustly. On the other hand, if each party pays its own attorneys, the matter is equalized, and neither will suffer in the final distribution of the estate. On this subject generally, see *In re Carman's Will*, (Iowa) 48 N. W. Rep. 985; *Meeker v. Meeker*, 74 Iowa, 352; *Howard v. Smith*, 78 Iowa, 73; *Perkins v. Perkins*, 116 Iowa, 253.

The appellants' motion to transfer the case to the equity side of the docket for trial was overruled, and error is assigned thereon. Code, section 3283, provides that, after a will has been produced, the clerk 10. SETTING aside the probate of a will. or court shall fix a day for proving it, and that, "when the probate of a will is contested, either party to the contest shall be entitled to a jury trial thereon." Section 3296 of the Code provides that the probate of a foreign or domestic will "shall be conclusive as

to the due execution thereof, until set aside by an original or appellate proceeding." The contention of the appellants is that whenever a will has been probated, whether with or without a contest, the order admitting it to probate can only be set aside in an equitable action. The exact reverse of this contention was held in *Leighton v. Orr*, 44 Iowa, 679, and it has been the practice in this state for more than a quarter of a century; and, if there were no judicial construction of the statute, we would hesitate long before departing from so venerable a rule. Nor do the cases cited by the appellants seem to announce a contrary doctrine. The appellants' motion to dismiss the cross-appeal is overruled.

The appellees filed an amendment to the abstract, containing about one hundred and fifty pages of testimony, set forth largely in the form of questions and answers. This form was not necessary for a proper understanding of the matter testified to, and greatly extended the record and amendment, the principal part of which is a repetition of the appellants' abstract, varied a little in manner of expression. The motion to strike this amendment is overruled, because we have found therein some material testimony not found in the original abstract; but there is so little of this that we order three-fourths of the cost of the amendment taxed to the appellees.

The judgment will stand **AFFIRMED** on the plaintiffs' appeal, and on the defendants' it is **REVERSED**.

BISHOP, C. J., taking no part.

THOMAS C. CARVER V. THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, Appellant.

Railroads: WRONGFUL ACT OF MAIL CLERK: KNOWLEDGE OF COMPANY. A railway company is not liable in the first instance for injuries resulting from the negligent act of a mail clerk in throwing the mail pouch from a moving car to the station

120	346
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134	428

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platform, but may become so liable by permitting the agent to pursue the dangerous practice for a sufficient time to charge it with knowledge of the custom.

Assumption of Risk. KNOWLEDGE OF DANGER. Mere knowledge
2 of a dangerous custom is not sufficient to throw the risk thereof upon the person having such knowledge unless he has also appreciated the danger involved.

Assumption of Risk: INSTRUCTION. Where one is injured by a
3 mail pouch thrown from a moving car while standing on a station platform at a place other than that at which he knows the pouch is usually thrown, he does not assume the risk and there is no occasion to instruct the jury with reference to assumption of risk as distinct from contributory negligence.

Assumption of Risk: CONTRIBUTORY NEGLIGENCE. The distinction
4 between assumption of risk and contributory negligence discussed.

Negligence of Mail Clerks: LIABILITY OF RAILWAY COMPANY.
5 Where a railway company is charged with knowledge of the negligent practice of mail clerks in throwing the mail pouch from a moving car to the station platform, it is liable to one rightfully on the platform, for injuries received thereby.

Appeal from Webster District Court.—HON. S. M. WEAVER,
Judge.

WEDNESDAY, MAY 13, 1908.

ACTION for personal injuries. Verdict and judgment for plaintiff. Defendant appeals.—*Affirmed.*

R. M. Wright for appellant.

A. N. Botsford and *Healy Bros. & Kelleher* for appellee.

McCLAIN, J.—The injury for which plaintiff seeks to recover resulted from his being struck by a mail bag thrown from the mail car in a passenger train on defendant's road while the train was still in motion. Plaintiff, at the time of receiving the injury, was standing on the passenger platform of defendant's road at the town of Otho, and near the north end of such platform, the train

coming from the south. He was thus standing on the passenger platform by reason of his employment, in which he had been engaged for about six years, as carrier of United States mails to and from the mail trains at this station.

It seems to be well settled, and is not specially questioned in this case, that while an agent of the United States postal department, in charge of a mail car, is not a servant of the railroad company carrying mails under contract with the United States government, in such sense that the negligence of the agent in the matter of throwing a mail bag from the train, causing injury to a bystander, is chargeable to the railroad company (*Munster v. Chicago, M. & St. P. R. Co.*, 61 Wis. 325, 21 N. W. Rep. 223, 50 Am. Rep. 141), yet the railway company is responsible in permitting the mail agent to pursue a course of conduct

with reference to the throwing off of mail bags at stations which is dangerous to bystanders, and if the course of conduct has been continued for a sufficient length of time, so that the railway company is presumed to have had knowledge thereof, its liability will be sufficiently shown. *Galloway v. Chicago, M. & St. P. R. Co.*, 56 Minn. 346 (57 N. W. Rep. 1058, 23 L. R. A. 442, 45 Am. St. Rep. 468); *Carpenter v. Boston & A. R. Co.*, 97 N. Y. 494; *Snow v. Fitchburg R. Co.*, 136 Mass. 552 (49 Am. Rep. 40); *Shaw v. Chicago & G. T. R. Co.*, 123 Mich. 629 (82 N. W. Rep. 618, 9 L. R. A. 308, 81 Am. St. Rep. 230). And the liability of the railroad company in this respect extends to injuries to persons who are rightfully on the platform, regardless of whether or not they are passengers or intended passengers. *Bradford v. Boston & M. R. R.*, 160 Mass. 392 (35 N. E. Rep. 1131). Indeed, we see no reason for any distinction, as to what will constitute negligence, between passengers and other persons rightfully on the platform at a railway station. *Galloway v. Chicago, M. & St. P. R. Co.*, *supra*.

1. WRONGFUL
act of mail
clerk: knowl-
edge of rail-
way company

There is no complaint of the submission of this case to the jury so far as the duty of the railway company to persons on the platform is concerned. But counsel for appellant contended in the lower court that plaintiff, having been aware of the usage on the part of the railway clerks to throw the mail bags from the trains before the trains came to a stop (the object being to have the bags drop on the platform, instead of north of the platform, when the train was coming from the south, and at a point where the mail car would necessarily be standing when the passenger car was opposite the platform), assumed the risk of this method of discharging the mail, and that, by reason of this assumption of risk, there was no negligence on the part of the railroad company, of which plaintiff could complain, in knowingly allowing the mail bags to be thus thrown from the train. Counsel asked an instruction in accordance with this view, which the court refused to give, although a proper instruction was given with reference to contributory negligence, and the refusal to give the instruction as to assumption of risk is now assigned as error. There is certainly some very eminent authority for saying that the doctrine of contributory negligence and that of assumption of risk do not necessarily cover the same ground, and that the fundamental distinction between the two is that where the risk has been assumed there is no negligence, so far as the person who has assumed the risk is concerned, in pursuing a course of conduct such as he has reason to anticipate, and the danger of which he must have fully appreciated. In other words, the doctrine of contributory negligence assumes that there has been negligence on the part of the defendant, and that it is thereupon necessary to determine whether the plaintiff has been in the exercise of such care that he may properly recover for injuries resulting from defendant's negligence—the rule being that, if his want of care has in any way contributed to the injury, he cannot recover, notwith-

standing the fault of the defendant—while the doctrine of the assumption of risk rests on the principle embodied in the maxim, "*Volenti non fit injuria*"; that is, no tort whatever is committed in failing to protect from injury one who has voluntarily assumed the danger of the injury. *Leary v. Boston & A. R. Co.*, 135 Mass. 580 (2 N. E. Rep. 115, 52 Am. Rep. 733); *Mundle v. Hill Mfg. Co.* 86 Me. 400 (30 Atl. Rep. 16); *Louisville, N. A. & C. R. Co. v. Corps*, 124 Ind. 427 (24 N. E. Rep. 1046, 8 L. R. A. 686); *Thomas v. Quartermaine*, 18 Q. B. D. 685. It may, perhaps, be true that the doctrine of assumption of risk, while it is usually applied in actions where the servant seeks to recover damages on account of the dangerous manner in which the business of the master has been carried on resulting in his injury, and is properly applied wherever the relation of master and servant exists, whether the particular danger has been guarded against by the master in a contract with the servant or not (*Martin v. Chicago, R. I. & P. R. Co.*, 118 Iowa, 148), is also applicable where the relation of master and servant does not exist between the person injured and the one whose course of dangerous conduct has occasioned the injury *Miner v. Connecticut River R. Co.*, 153 Mass. 398 (26 N. E. Rep. 994); *Wood v. Locke*, 147 Mass. 604 (18 N. E. Rep. 578); 1 Thompson, Negligence (2d Ed.) section 184.

Notwithstanding the authorities which we have cited, there seems to be still some doubt about the nature and scope of the doctrine of assumption of risk, as distinguished from the doctrine of contributory negligence.

2. **ASSUMPTION of risk: knowledge of danger.** See dissenting opinion of Knowlton, J., in *Davis v. Forbes*, 171 Mass. 548 (51 N. E. Rep. 20, 47 L. R. A. 198, note). But at any rate, it is well settled that the mere knowledge of the existence of the custom or condition which is dangerous is not sufficient to throw the risk thereof upon the person having such knowledge, unless he has also appreciated the danger involved. *Fitzgerald*

v. Connecticut River Paper Co., 155 Mass. 155 (29 N. E. Rep. 464, 31 Am. St. Rep. 537); *Cenley v. American Exp. Co.*, 87 Me. 352 (32 Atl. Rep. 965); *Mundle v. Hill Mtg. Co.*, 86 Me. 400 (30 Atl. Rep. 16); *Warren v. Boston & M. R. R.*, 163 Mass. 484 (40 N. E. Rep. 895); *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583 (37 N. E. Rep. 778, 25 L. R. A. 552); *Mahoney v. Dore*, 155 Mass. 513 (30 N. E. Rep. 366); *Thomas v. Quartermaine*, 18 Q. B. D. 685.

In the case before us it was found, by an answer of the jury to a special interrogatory, that the usage in regard to throwing mail bags from defendant's train at this station was to so throw them that they should fall on the platform in front of the station house, and not at the north end of the platform, which extended some distance beyond the station house. Assuming, then, that plaintiff knew that the bags were likely to be thrown off while the train was in motion, he was not chargeable with any knowledge of a risk involved in such practice, so far as he was concerned, for it was his custom to stand at the north end of the platform, where he was on this occasion. He did not assume, therefore, any and every danger that might arise from throwing the bags from the car while the train was in motion, and had taken the precaution to place himself in such situation as not to be injured by reason of this practice, and cannot be said to have assumed any risk incident thereto. The idea of counsel seems to be that plaintiff assumed every risk incident to the usage of which he had knowledge, while, conceding everything that can reasonably be claimed for the authorities cited by counsel, the true rule is that plaintiff assumed only such dangers as were reasonably to be apprehended by him to himself in the position which he took as incident to the usage of which he had knowledge. As illustrating this distinction as applicable to a very similar case, see *Muster v. Chicago, M. & St. P. R. Co.*, 61 Wis. 325 (21 N. W. Rep. 223, 50 Am. Rep. 141), where it was

3. ASSUMPTION
of risk: in-
struction.

held that one going to a train to receive the mail to be thrown from the mail car was not precluded from recovering for injuries resulting from being thrown from a platform, the support of which was knocked down by being struck by a mail bag thrown from a moving train, where it appeared that the usage was to throw the bags off some distance from such platform. Under the evidence in this case, therefore, there was no occasion to instruct the jury with reference to assumption of risk, as distinct from contributory negligence, for, giving all the significance which can possibly be attached to it, in connection with the finding of the jury that the bags had never before been thrown off so as to imperil any one at the north end of the platform, there was no possible application for the rule.

We have assumed that in such a case as this there might, under some circumstances, be proper occasion to apply the doctrine of assumption of risk. But we are un-

4. ASSUMPTION of risk: contributory negligence. willing to even apparently indorse the recognition of that doctrine as applied to a case where the negligent course of conduct which it is claimed had been assumed and recognized is connected with the discharge of a duty to the general public. We should not be willing to have it thought possible for a municipal corporation, for instance, to escape liability to a person entitled to the use of its streets, by reason of its persistently, notoriously, and intentionally having made those streets dangerous for the use of the public. One who desires to avail himself of a public privilege ought not to be said to have assumed the risk of defective streets in such sense that the city owes him no duty, under the maxim, "*Volenti non fit injuria*." One who negligently incurs the danger of a defective street may not be entitled to recover for the injury received, but that is not on the theory of assumption of risk, involving no liability on the part of the city, but on the ordinary ground of contributory negligence, which assumes that the city is at fault as

to a defect in the street, and defeats the plaintiff seeking to recover for an injury from such defect only on the ground that he also has been guilty of negligence.

So in this case the plaintiff, and every other member of the public desiring to transact business or avail himself of the advantages of the service of defendant as a common carrier, including the carrier of mails under contract with the United States government, was entitled to go upon the station platform, and to assume that such platform was a reasonably safe place. Plaintiff was not bound to assume that, because on some previous occasions the defendant had allowed the mail bags to be thrown from its trains in a negligent way, such negligent conduct would be continued, but had a right to assume that it would be discontinued. No doubt, as to a peculiar danger, apparent to him, and which he could reasonably have avoided, he would be guilty of contributory negligence if he failed to use reasonable care in avoiding it. If, in a particular instance, the operation of the train would make a particular place on the platform dangerous, on being notified in any way—either by his own observation, or by advice of the servants of the company—of such danger, he should, if practicable, avoid being at such place and incurring the danger incident thereto; but this is the ordinary doctrine of contributory negligence, and is quite different from the doctrine that, by general notice of a dangerous course of conduct, one who seeks to avail himself of the privileges of the defendant's platform assumes the risk of such course of conduct. Any such rule would make it feasible for a railroad carrier, by posting notices on its platform, "This is a dangerous place," to relieve itself entirely from liability. Such a doctrine would be manifestly unreasonable.

Counsel dwell on the thought that plaintiff actively participated in the dangerous course of conduct, by placing himself in position to throw the mail matter which he

brought for the train into the open door of the mail car before the train had come to a full stop. But the risk involved in his attempting to do so was not the risk incident to the bags being thrown from the train while in motion. He had no control over that matter, had not been consulted about it, and had no occasion to protest, so long as, without contributory negligence on his part, he was able to secure the mail bags after they had been thrown out; and, as has already been stated, he was not guilty of contributory negligence in being where he was, unless he had reason to anticipate that the mail bags would be thrown off so as to strike him at that place. The question of contributory negligence was properly submitted to the jury, and the finding was against the defendant on that issue.

It is further urged, however, in behalf of appellant, that if the course of negligent conduct on the part of the mail agent, as known to the defendant, was to throw off the mail from the moving train at about the middle of the platform, and not at the north end of it, where plaintiff usually stood, then, so far as plaintiff was concerned, the defendant was not responsible for the improper conduct of the mail agent in this instance in throwing the mail so that it would strike plaintiff at the north end of the platform. This idea was embodied in the instructions given by the court, and counsel contend that, under the finding of the jury that the mail bags had never before been thrown off at the north end of the platform, the jury should have found defendant not liable for plaintiff's injuries. But the instruction given, and which is to be treated as the law of the case for the jury, was that if, in the exercise of reasonable care on the part of the railroad company, it could not have anticipated that any accident or injury from the throwing of the mail bags at a point at or near the middle of the platform was likely to occur at the place where plaintiff stood at the

5. NEGLIGENCE
of mail clerks:
liability of
railway com-
pany.

time of his alleged injury, then no negligence could be charged against the company. But even if the mail bags had never before been thrown so as to imperil a person at the north end of the platform, nevertheless it was open to the jury to find that, in the exercise of reasonable care on the part of defendant, it could have anticipated an accident as likely to occur at that place from the general practice of throwing the mail bags from the train while in motion. The general practice was negligent; it imperiled the safety of persons on the platform; and we do not think that the jury was bound by the instruction to say that, if the bags had never before been thrown off at the north end of the platform, the usage, if persisted in, was not likely to imperil persons standing at that place. It was the general usage of throwing bags from the train while in motion, and not the usage of throwing them to the middle of the station platform, which constituted the negligence properly complained of.

We find no error in the action of the trial court, and the judgment is **AFFIRMED**.

**JOHNSON BROTHERS, Appellants, v. CARTER & COMPANY, AND
J. E. CARTER AND W. E. BROWN.**

Partnership: EVIDENCE OF: SUFFICIENCY. Where one supplies

- 1 the money to conduct an enterprise for a fixed rate of interest and a share in the net profits, acquiesces in the use of a firm name, furnishes a bookkeeper to handle the funds to offset the labor of the other in overseeing the work, takes the other's note for one-half the cost of material on hand at the close of the business, and states to a third party that the bookkeeper in using the firm name has full authority to represent him, it may be inferred that a partnership relation exists, and is sufficient to authorize submission to a jury of the question of his liability on a note in the firm name signed by the other.

Partnership: SHARING OF PROFITS AND LOSSES. The following
2 principles in relation to partnership are established by the

decisions of this state: (1) An agreement only to share profits will not constitute a partnership, though evidence of the existence of such relation; (2) The sharing of losses is essential to a partnership, though the undertaking to do so may be inferred from an agreement to divide profits, unless precluded by the terms thereof; (3) That payment for services or for the use of money or property to be used in the business may consist of a share of profits without making the loaner or employe a partner.

Statements of Employee: DENIAL OF PARTNERSHIP: ESTOPPEL.

8 Where plaintiff extended credit to a supposed firm, relying upon representations of an employe that one of defendants was a member of such firm, if there was in fact no partnership and the employe was not authorized to act for such defendant, he was not estopped to deny the partnership.

Appeal from Buena Vista District Court.—HON. W. B. QUARTON, Judge.

WEDNESDAY, MAY 13, 1903.

ACTION on a promissory note of \$1,232.12, signed "Carter & Co., by J. E. Carter," dated February 7, 1900, and payable in sixty days. The petition alleges that the defendant Brown was a member of that firm, and as such liable on the note, and also on a guaranty. The defendant put these allegations in issue. After plaintiffs had introduced their evidence, the court directed a verdict for the defendant. Judgment was entered thereon, and the plaintiffs appeal.—*Reversed.*

Tait & Jackson and *F. H. Helsell* for appellants.

F. F. Fayville and *Carr, Hewitt, Parker & Wright* for appellee.

LADD, J.—It appears that McGee, Kahman & Co. had contracted with the Ft. Dodge & Omaha Railroad Company to grade its entire line of road, and that said firm had

entered into a subcontract with J. E. Carter to grade two miles of the line near Wall Lake. Carter had an uncompleted contract with the Chicago & Northwestern Railway Company, and, being in need of financial assistance, consulted the defendant Brown. They entered into an arrangement under which the grading was done. Were they partners? Carter testified that he exhibited to Brown his contract with McGee, Kahman & Co., and a profile of the road; informed him that he must have "some one to go with him to do the work, or who would furnish the money to carry him"; that there would be a good profit in the contract, and proposed to give Brown one-half the profits if he would furnish the money; that Brown offered to go in if he could send a man to take care of his part of the work and look after the books; that it was agreed that he should furnish such a man, whose time should offset that of Carter, who was to oversee the work; that Brown should furnish from three to five thousand dollars, and receive half the profits. The witness was unable to recall all that was said, but declared that they talked over twice "what he should have and what I should have, and what he should furnish and what I should furnish." He further testified: "In that connection Mr. Brown said something to the effect that I ought to have a man there to look after the books, and I said, if he would furnish that money and a man to keep my books, and to help me in my contract to carry it out, that he should have a one-half interest in the net profits. * * * The question came up about the manner of keeping my books, to this effect: It was stated by them to me that I was carrying on this railroad contract over on the Northwestern, and was having expenses in that, and I was carrying on the contract with the Ft. Dodge road, and would have to anyway, both at the same time, and there must be some way of distinguishing between the expenses on the Northwestern and the expenses on the Ft. Dodge road; that was talked, and the understanding was

that the way I would keep my books, so that the money that came in from that contract on the Ft. Dodge road would be kept under the name of Carter & Co., and then I would keep the other under my own name in my books, so they would not conflict. Mr. Campbell, I think, suggested a firm name." Brown furnished John Campbell, who kept the books in the name of Carter & Co., and transacted all the business, buying all supplies and handling all the funds, while Carter had charge of the men doing the work. The men employed were boarded, and the price of board deducted from their wages. The note sued on was executed for supplies bought by Campbell, and by his direction charged to Carter & Co. Brown honored sight drafts on his bank, signed by "Carter & Co.," received notes so signed for moneys advanced, and, in writing, so addressed some of his letters. He advised Goodwin, a banker at Wall Lake, over the telephone, that Campbell had full authority "to do any business down there in regard to the work going on; * * * that anything Campbell did was with his full consent." Though the conversation was concerning an application of Campbell to borrow money for Carter & Co., Goodwin testified: "We were talking in a general way. I asked if Mr. Campbell had authority to transact business down there, and he said 'Yes.' " Upon the completion of the grading contract, including three additional miles, Carter executed his note to Brown for one-half of the cost of the horses, scrapers, etc., bought during the season and remaining on hand. This is substantially all the evidence bearing on the issue as to whether Brown was a partner in the firm of Carter & Co. On the one hand, plaintiff contends that it was sufficient to carry that question to the jury, while on the other defendant insists that the evidence shows what the agreement was, and that it was properly construed as not creating the relationship of partners between Brown and Carter.

It may be conceded that where an agreement is fully proven, and is not ambiguous in terms, the court should declare its meaning, and define the rights and obligations of the parties created thereby. But we do

1. PARTNERSHIP: evidence of: sufficiency. not think this is such a case. While the firm name of Carter & Co. was apparently selected for convenience in bookkeeping, there is nothing to indicate that it was not to include both parties to the enterprise. Brown's employment of Campbell, at his own expense, to act as bookkeeper and to handle the funds of Carter & Co., as an offset to Carter's time, together with his assurance of Campbell's full authority to act for him, are circumstances tending to show that such was their intention. True, he advanced the money to execute the contract, but he was a banker, and under the arrangement was to receive for its use the highest legal rate of interest. In these circumstances, the stipulation for one-half the net profits of the enterprise is more consistent with the theory of a partnership than a mere loan. The use of the words "net profits" may well have been understood as profits after the payment of interest. Both parties appreciated that large expenditures would be necessary, and the reference to such profits cannot be held, as a matter of law, to exclude the inference of the obligation of each to bear his just proportion of the losses, if any should occur. The thought, doubtless, was that all expenses should be paid out prior to the division of gains. If the money advanced was merely loaned to Carter, how happened it to be handled exclusively by Brown's representative, all purchases made by him, and everything done in the name of Carter & Co.? Possibly inferences explanatory of this may be drawn from the evidence, but not necessarily so. The conclusion that there was a partnership seems quite as reasonable. Of course, the mere sharing of profits will not be construed as establishing the partnership relation. *Ruddick v. Otis*, 33 Iowa, 402.

2. PARTNERSHIP: sharing of profits and losses.

But it is an important circumstance to be taken into consideration. The obligation to share losses is an essential element to its existence. *Winter v. Pipher*, 96 Iowa, 17. But enterprises are not usually undertaken with a view of loss, and the mere fact that provision therefor is not expressly made does not preclude the inference that each partner is to bear his portion of the burdens as well as reap his share of the benefits of the venture. "An agreement to share profits, nothing being said about losses, amounts *prima facie* to an agreement to share losses also, for it is but fair that the chance of gain and of loss should be taken by the same persons, and it is natural to suppose that it was their intention, if they have said nothing to the contrary; and accordingly it has been held that, unless an intention to the contrary can be shown, persons engaged in any business or venture, and sharing the profits to be derived from it, are partners as regards the business or adventure." 1 Lindley on Partnership (Ewell) 80. This principle was recognized in *Richards v. Grinnell*, 63 Iowa, 44, where the court, speaking through Rothrock, J., said: "It is not necessary, in order to constitute a partnership, that there be an express agreement that each party shall bear a share of any losses which may occur in the business. This may be inferred from other provisions of the contract, the nature of the business, and the relation of the parties to the business to be transacted."

In the decisions of this court denying the existence of a partnership because of there being no obligations to share the losses, the agreements have been such as to exclude any such inference. Thus, in *Porter v. Curtis*, 96 Iowa, 539; *Winter v. Pipher*, 96 Iowa, 17; *Holbrook v. Oberne*, 56 Iowa, 324; *Kraus v. Meyer*, 32 Iowa, 566; *McBride v. Ricketts*, 98 Iowa, 539, and *Reed v. Murphy*, 2 G. Greene, 574—the contracts were those of employment at a percentage of the profits, or this with salary added. There was no community of interest, save the contingent

share of the profits in payment of services rendered. *Ruddick v. Otis*, 33 Iowa, 402, involved merely an advance to a firm for the purchase of wool, with a stipulation that one-third of the profits realized should be paid for its use. In *Williams v. Soutter*, 7 Iowa, 435, Drem advanced money to the firm of Soutter & Way to be used in the business for one year, on condition that it be then returned with thirty per cent. interest, or, at his option, one-third of the profits after deducting expenses. In *Clark v. Barnes*, 72 Iowa, 568, Seig & Williams furnished Barnes & Co. money and stock to manufacture wagons, upon an agreement to repay, with one-half the profits. In the last two cases the nature of the contracts precluded the notion that the parties advancing money were to share the losses, and gave them no control or direct interest in the business. From these authorities may be deducted, as established in this state, the following principles: (1) That the agreement only to share profits will not constitute partnership, though evidence of existence of that relation. (2) The sharing of losses is essential in a partnership, though the undertaking to do so may be inferred from an agreement to divide profits, unless precluded by the terms thereof. (3) That payment for services, or for the use of money or property to be used in the business, may consist of a share of profits, without making of the loaner or employe a partner.

The absence of any participation in or control of the business is generally mentioned as indicating that a party is not a partner, and, of course, the converse must follow. Indeed, it will be found in most of the cases where the relationship is declared to exist *inter se*, the party held has enjoyed a direct, rather than merely a contingent, interest in the enterprise. The use of the term "partnership" is not essential, and the adoption of a firm name may be dispensed with. The facts of no two cases are exactly alike. The only crucial test seems to be the intention of the parties. If it appears to have been their purpose to

enter into the relation of partners, all subterfuges of either, resorted to in order to evade liability for possible losses, while securing certainty of the advantages to be derived from the relation, must be disregarded. Brown was careful to guard his portion of the prospective profits. From what he did in agreeing to a firm name, though ostensibly for convenience in bookkeeping, in acquiescing in its use in all matters connected with the enterprise, in the division of the profits after exacting the highest legal rate of interest for money supplied, in furnishing a man to act in his behalf in transacting the business, as an offset to the labor of Carter in overseeing the employes, in taking Carter's note for the cost of half instead of all the materials bought and remaining on hand, and in admitting that Campbell, in making use of the firm name "Carter & Co.," had full authority to represent him, it might have been inferred that he was not merely acting as a money loaner but as a partner, and that both he and Carter so understood in the selection of a firm name, and so intended in carrying on their joint enterprise.

II. Plaintiffs doubtless extended credit to Carter & Co, in reliance on Brown being a member of the firm. If Brown was not in fact a member, Campbell must have been employed to assist Carter, and, if so, was not authorized to act for Brown in making purchases. In such circumstances the latter would not be bound by what Campbell said in buying goods of plaintiffs for Carter & Co., and as his representations, and not Brown's conversation over the telephone with Goodwin, induced plaintiff to extend credit to that firm, Brown would not be estopped from denying that he was a member thereof by having held himself out as such member and having thereby misled them. If, then, Brown and Carter were not partners, the former is not liable. In other words, the facts of the case are such that the issue of estoppel ought not to be submitted.

3. STATEMENTS
of employee:
denial of
partnership:
estoppel.

III. It is unnecessary to consider the issues raised with respect to the guaranty signed by Brown to induce plaintiffs to dismiss a suit previously begun on this same indebtedness. Objections now interposed to recovery thereon may be obviated by other evidence introduced on the next trial. The rulings on the admissibility of evidence were so manifestly correct as not to demand detailed consideration. For the error pointed out, the judgment is REVERSED.

120 363
131 228

C. M. SYCK, Plaintiff, AND LYMAN D. BAIRD, Intervenor,
Appellants, v. WILLIAM BOSSINGHAM, Appellee.

Conversion: STOCK OF GOODS: EVIDENCE. Plaintiff purchased a
1 stock of goods, taking a bill of sale which was improperly acknowledged and never recorded, and his brother went into possession. Thereafter he gave a mortgage on the stock to secure a note signed by himself and brother for the purchase price, which was duly recorded and assigned to the intervener. Defendant claimed the goods under an attachment against plaintiff's brother; plaintiff admitted that he did not own the goods but claimed that the bill of sale was in fact a mortgage to secure him as surety on the note. It also appeared that most of the goods covered by the mortgage had been sold and the remainder mingled with another stock owned by the brother of plaintiff. Held, that in an action for conversion a verdict was properly directed for defendant.

Stock of Goods: MORTGAGE: PRESUMPTION AS TO TITLE. The ex-
2 cution of a chattel mortgage does not raise the presumption that the mortgagor is the owner of the goods covered by the mortgage, especially as against one not a party to the mortgage.

Appeal from Kossuth District Court.—HON. W. B. QUARTON, Judge.

THURSDAY, MAY 14, 1903.

ACTION for the conversion of certain personal property. Defendant claimed the goods under an attachment sale thereof as the property of T. B. Syck. Lyman D. Baird

intervened, claiming possession of the property under a chattel mortgage executed by plaintiff to one Stilson, and by Stilson assigned to the intervener. At the conclusion of the evidence the trial court directed a verdict for defendant, and plaintiff and intervener appeals.—*Affirmed.*

Clarke & Cohenour for plaintiff appellant.

E. H. Clarke for intervener appellant.

F. M. Curtis and *B. E. Kelly* for appellee.

DEEMER, J.—Complaint is made of a ruling on a motion to strike parts of defendant's answer to the petition of intervention. As the case did not go to the jury, and as the matter complained of did not go to the merits of the controversy, we have no occasion to rule on the complaint.

On the 14th day of February, 1898, one A. K. Sutton made what purports to be a bill of sale of "a stock of clothing, furniture, and fixtures, now in store at Belmond, Iowa," to C. M. Syck for the expressed consideration of \$5,071.17. This bill of sale was not properly acknowledged, nor was it ever recorded. T. B. Syck, a brother of C. M., went into possession of the goods said to have been covered by this bill of sale. On the said 14th day of February, C. M. Syck, who resides in Austin, Minn., made what purports to be a chattel mortgage to A. R. Stilson to secure a note of the same date, signed by C. M. and T. B. Syck, for the sum of \$448.17. This mortgage described the goods covered thereby as follows: "All the stock of goods, consisting of clothing, furniture, and fixtures, described in an invoice thereof dated February 11, 1898, being all the stock and fixtures now contained in the frame store building situated on the Main street at Belmond, Iowa, being the same stock of goods this day sold to the said C. M. Syck by the said party of the second part; all of the said property being now in possession of said first party,

in the village of Belmond, county of Wright, and state of Iowa, and free from all incumbrances." This mortgage was duly filed for record with the recorder of Wright county, Iowa, in which the town of Belmond is situated, on February 16, 1898. Thereafter, and on the 23d day of February, 1898, Stilson, by written instrument, assigned the aforesaid note and chattel mortgage to intervener, Lyman D. Baird, for the consideration of \$400. On February 27, 1899, defendant brought suit in the Kossuth county district court against T. B. Syck and Emma, his wife, to recover the sum of \$800, and sued out a writ of attachment, which was levied on the property in dispute, which was then in the town of Hobart, in Kossuth county. Judgment was obtained against the defendants in that action for the sum of \$939.39, and the attached property was sold to defendant under a special execution. Plaintiff, as we have said, brought action against defendant for the conversion of the goods, and Baird intervened, claiming that he was entitled to the possession thereof under the chattel mortgage assigned to him by Stilson. Defendant avers that the title to the goods was in fact in T. B. Syck, or Emma, his wife; that he had no notice or knowledge of the alleged bill of sale; that T. B. Syck was at all times in possession of the goods; and that any apparent title C. M. Syck may have had in the goods was fraudulent and void as to the creditors of T. B. and Emma Syck.

There are several reasons why the motion to direct was properly sustained. In the first place, plaintiff admits himself that he does not own the goods or any part thereof.

1. **CONVERSION:** He claims that the Stilson bill of sale was in
stock of goods
evidence. fact a mortgage made to him to secure him
for signing the \$448 and other notes executed by his
brother T. B. for the balance of the purchase price of the
Belmond goods; that the brother T. B. traded a farm for
the goods, which was sufficient in value to cover the ex-
change value of the stock; and that he never in fact owned

the goods. Moreover, T. B. was at all times in possession of the Belmond stock, claiming to be the owner thereof, and the Stilson bill of sale was never recorded.

Further, it appears that most of the goods in the Belmond stock were sold, and the remainder were removed to Hobart, and there mixed with another stock of goods which T. B. Syck, or his wife, or both of them, obtained from defendant, Bossingham, through another trade.

Aside from this, plaintiff did not sufficiently identify the Belmond goods to justify an action for conversion against the defendant. For these reasons, and others which might be suggested, plaintiff was clearly not entitled to have his case for conversion submitted to the jury.

II. As to the intervener's claim: He has a mortgage upon some goods in Belmond executed by plaintiff, O. M. Syck. If this mortgage was not executed by the owner of

a. Stock of
goods: mort-
gage: pre-
sumption as
to title.

the goods, it is, of course, of no validity. At any rate, his claim is that O. M. Syck was the owner of the goods, which were at Belmond, and that as such owner he made the mortgage relied upon by him, and as such mortgagee he is entitled to recover the goods for the conversion of which this suit was brought. The evidence from all of the Sycks is that T. B. Syck was the owner of the Belmond stock, and there is, of course, no claim that intervener ever had any lien upon the goods which T. B. Syck or his wife acquired from the defendant. The only evidence of ownership in plaintiff is the fact that he gave the mortgage to Stilson to which we have referred. We have expressly held in at least two cases that no presumption arises from the execution of a mortgage that the mortgagor owns the property therein described. *Everett v. Brown*, 64 Iowa, 420; *Warner v. Wilson*, 78 Iowa, 719. The writer would be disposed to doubt this rule were it an original proposition, but, having been twice announced, we are not disposed at this time to question it. See, also, *Andiegg v. Brunskill*, 87 Iowa, 351.

Perhaps the rule is correct where, as in this case, the controversy is between a mortgagee and a stranger, who is not bound, of course, by the terms of the written instrument to which he is not a party and with which he is not in privity. Certainly there are stronger grounds for saying in such a case that there is no such presumption than where a controversy arises as between the parties to an instrument. This is practically all there is to intervenor's case. He did not produce Stilson as a witness, and evidently relied wholly upon a presumption arising from the possession of the mortgage. Were the controversy between plaintiff and intervenor, doubtless the statement made in the mortgage regarding the ownership of the property would be conclusive on plaintiff, and estop him from denying it. But that is not the case. The main issue here is between intervenor, a mortgagee, and defendant, who is an entire stranger to that document. The statement made in the mortgage could doubtless be used for impeaching C. M. Syck as a witness, but it should not be treated as substantive proof against the defendant.

This is sufficient to dispose of the case. But, aside from this, intervenor did not sufficiently identify the property which he claims was covered by his mortgage. The stock at Hobart was not in its entirety covered by that instrument. A large addition of another stock was made thereto; but, as we understand the record, this was kept separate from the Belmont stock. A witness was offered to identify the goods, but he did not do so with any degree of clearness. Had the case gone to a jury, it could not, on the evidence before us, have returned a verdict identifying the goods covered by intervenor's mortgage. It is not a case of confusion of goods where the mortgagee may be permitted to take the entire mass. It is said in argument that T. B. Syck was in possession of the goods as agent for C. M.; but there is no evidence, aside from that to which we have referred, to substantiate this claim. It

may be that this whole transaction between C. M. and T. B. Syck was a fraud; but there is nothing but mere surmise to justify this inference. However this may be, there is no evidence that defendant, who sold the Hobart stock to T. B. Syck or to his wife, had any knowledge of this fraud. He was not bound to examine the record for mortgages made by C. M. Syck, for he (Syck) was a resident of the state of Minnesota, and the goods were at all times in the possession of T. B. Syck.

The motion to direct a verdict was properly sustained
—AFFIRMED.

DAVID SMEATON, Appellant, v. U. C. COLE.

Landlord and Tenant: ATTACHMENT: RENT DUE: COUNTERCLAIM.

- 1 The provision of Code, section 3880, providing that the petition in landlord's attachment shall state that something is due, has reference to the maturity of the claim for rent and not the balance of indebtedness owing from one party to the other, and the landlord is not precluded from attaching for rent due, by reason of the fact that the tenant has claims against him in excess of the rent.

Malicious Issuance of Writ. Where the landlord has a valid claim

- 2 against the tenant for rent, the fact that the tenant has claims against the landlord in excess of the rent will not justify a conclusion that the landlord was actuated by malice in suing out the writ.

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

THURSDAY, MAY 14, 1903.

In this action, damages are demanded of defendant for suing out a landlord's writ of attachment maliciously and without probable cause. To support the allegations of the petition, the pleadings in the former action, a part of the court's instructions, the judgment therein, and some of the

proceedings incident to the care of the property seized, were introduced in evidence. From these it appears that this defendant, as plaintiff in that action, began a suit for the recovery of \$114 as rent for the use of a greenhouse April 23, 1892, under a written lease, alleged to have been assigned by a former tenant to this plaintiff, caused a writ of attachment to be issued and levied on "all plants and flowers in rooms Nos. 1, 2, 3, and 4" thereof, and also a mare, buggy, and single wagon, and two days later procured the appointment of a receiver. Five hundred dollars was also asked as damages said to have been occasioned by breaches of the said written lease. This plaintiff answered therein September 13, denying the assignment, and alleging an oral arrangement, by the terms of which the defendant was to turn over to him all the pots and plants, save two large palms, and he to pay a monthly rental of \$15, and put in condition and repair the buildings and grounds, and defendant to furnish necessary materials and put and keep in repair the heating apparatus; that, owing to this defendant's failure to furnish material and repair as aforesaid, plants to the value of \$1,500 were destroyed by frost; and also that he had furnished materials at this defendant's instance to the value of \$99.65. Upon trial the defendant herein was allowed rent as claimed, and the plaintiff herein \$400 on his counterclaim. The foregoing was all the evidence introduced by plaintiff, and, when he had rested, the court, on motion, directed a verdict for the defendant. From the judgment entered thereon, plaintiff appeals.—*Affirmed.*

Bowen & Brockett for appellant.

John Newburn and *C. C. Cole* for appellee.

LADD, J.—The sum of \$114 was found due the landlord for rent accrued, precisely as alleged in his petition, and the tenant was allowed \$400 on his counterclaim. Con-
VOL. 120 IOWA.—24.

rary to appellant's contention, this was a finding that something was due plaintiff, within the meaning of our statutes. Section 2992 of the Code creates a lien for rent in favor of the landlord, and the section following provides that the lien may "be effected by the commencement of an action during the period above prescribed for rent alone, in which action the landlord will be entitled to a writ of attachment, upon filing with the clerk or justice a verified petition stating that the action is commenced to recover rent accrued within one year previous thereto upon premises described in the petition, and the procedure thereunder shall be the same, as nearly as may be, as in other cases of attachment, except no bond shall be required." As therent had accrued, the defendant might resort to this remedy, provided he followed the procedure prescribed

by ordinary attachments. Section 3881 of the Code requires the petition, when the action is on contract, to "state that something is due and, as nearly as practicable, the amount." This is to serve as a guide to the sheriff, who must levy on property one and one-half times in value such amount. Section 3881. Where the action is not based on contract, the allowance in value of property to be levied on must be fixed by the judge. Section 3882. Section 3883 relates to the suing out of a writ of attachment "on debts not due when nothing but time is wanting to fix an absolute indebtedness," additional grounds therefor to be stated in the petition. It is manifest from these statutes that the word "due," as used in them, has reference to the maturity of the claim, rather than the balance of indebtedness owing from one party to the other. What must be alleged is that something is due. On what? The contract sued on, and the amount thereof, are to be stated. Something may be owing by the plaintiff to the defendant in another transaction, but if it has not been applied in payment, such debt continues unimpaired, and defendant may elect not

1. ATTACH-
MENT: rent
due: counter
claim.

to plead it as a set-off or counterclaim, but to make it the subject of a separate and distinct action. *Jones v. Witousek*, 114 Iowa, 14. The petitioner then has no right to assume that defendant will interpose what will be owing him by way of a set-off or counterclaim, rather than institute a separate action, and all required is that he state with reasonable accuracy the amount due him under the contract on which the action is based.

In the instant case the items demanded by the tenant, whether in the way of unliquidated damages or disputed charges for the services rendered, were not payments, and were not allowed as such by the court. They were pleaded by way of counterclaim, and, as such, applied to the extent necessary by way of deduction. None of the cases cited by the appellant treat "set-off" or "counterclaim" as synonymous with "payment." See *Eldredge v. Bell*, 64 Iowa, 125; *Ware v. Howley*, 68 Iowa, 633; *Van Sandt v. Dows*, 68 Iowa, 594; *Union Mill Co. v. Prenzler*, 100 Iowa, 540; *Lucore v. Kramer*, 22 Iowa, 387. They proceed on the theory that the representative of the deceased in the matter of the collection of debts due an estate merely steps into the shoes of his decedent, and must maintain his action subject to like defenses or counterclaims. As indicated in the last case cited, in ascertaining the amount to be awarded, "mutual claims compensate each other," and "the amount which may be due is always the balance left after deducting the lesser from the greater sum," precisely as though the action had been brought by deceased in his lifetime. But this is not saying they have been previously so applied.

We are not to be understood as intimating that malice and want of probable cause are necessarily to be inferred from a finding of nothing due. In such a case the writ has been wrongfully issued, but, in the absence of statute, this alone will not warrant the recovery of damages. *Tallant v. Burlington Gaslight*

2. MALICIOUS
issuance of
writ.

Co., 86 Iowa, 262; *Frantz v. Hantford*, 87 Iowa, 469; *Carraher v. Allen*, 112 Iowa, 168. It is because of section 3887 of the Code, providing for recovery on the bond, that damages for the mere wrongful suing out of the writ are allowed. *Porter v. Wilson*, 4 G. Greene, 314; *Young v. Broadbent*, 23 Iowa, 539. On the strength of these decisions so holding, the court seems to have applied the same rule in the case of a landlord's writ of attachment, issued without bond, in the absence of any similar statute. *Harger v. Spofford*, 46 Iowa, 11, cited with apparent approval in *Sigler v. Murphy*, 107 Iowa, 128. In the first of these the theory on which damages were allowed by the jury does not appear, and the last was remanded for new trial. It would seem these decisions can only be upheld on the theory that from a finding of nothing due the inference of want of probable cause and of malice may be drawn. If so, such inference is permissible only, and the subject to be rebutted by other evidence introduced and circumstances established on the trial. But whether this be so or not, the mere finding that more was owing defendant in the former suit on the counterclaim than was due plaintiff therein on the petition does not, alone, justify the conclusion that plaintiff was actuated by malice. He might have been entirely ignorant of the adverse claims at the time of suing out the writ.

The jury was properly directed.—AFFIRMED.

BISHOP, C. J., taking no part.

GEORGE W. YOUNG, Appellee, v. T. A. GORMLEY AND S. P. GEIGER, Appellants.

Pleadings: ARREST: ALLEGATION OF: LOSS OF TIME. In an action
1 for an illegal arrest, an allegation that plaintiff was deprived of his liberty implies loss of time.

Evidence in Aggravation of Damages. In an action for an illegal
2 arrest plaintiff may show in aggravation of damages that he was arrested in the presence of his family.

Illegal Arrest. RESPONSIBILITY OF MAYOR: EVIDENCE. In an action
8 against the marshal and mayor of a town for an illegal arrest
of one claimed to have interfered with the city officials in
their efforts to open a claimed street, the fact that the mayor
directed the marshal to protect the street commissioner in
opening the street, and when arrested refused to discharge
plaintiff and caused him to repeatedly appear for trial, finally
informing him there was no charge made, is sufficient to con-
nect the mayor with responsibility for the arrest.

Interference with Private Property: AUTHORITY OF CITY OFFICIALS:

4 **ARREST.** A mayor or other city officials have no more right
as such officers to dispossess a citizen of the town of land
claimed by him without legal process than one citizen has to
dispossess another, and when a citizen resists the wrongful
and unauthorized acts of city officials in interfering with his
property and is arrested without warrant, the arrest is wrongful.

Assessment of Damages: MENTAL PAIN. In an action for wrong-
5 ful arrest, the facts and circumstances being shown, the jury
may therefrom assess such damages, which, as fair minded
men, they believe just and reasonable to allow for mental suf-
fering and humiliation.

Same. Damages for mental pain and suffering are actual, not
6 punitive.

Appeal from Lynn District Court.—HON. H. M. REMLEY,
Judge.

THURSDAY, MAY 14, 1903.

ACTION for damages for an alleged illegal arrest. Ver-
dict and judgment for plaintiff, and defendants appeal.—
Affirmed.

William Glenn and Jamison & Smyth for appellants.

C. W. Kepler and Smith & Smith for appellee.

WEAVER, J.—The evidence tends to establish the fol-
lowing facts: The appellants are, respectively, mayor and
marshal of the town of Mt. Vernon. On the claim that
certain land occupied by the plaintiff was a public street,
the mayor ordered the fences, sidewalk, and other obstruc-

tions to the use of said alleged street removed therefrom. The plaintiff resisting such interference with his possession, the marshal, acting under the orders of the mayor, but without warrant, arrested him. On being taken before the mayor, plaintiff demanded to know the charge made against him, and asked for a trial; but the mayor, stating that he desired time "to consult counsel," refused to proceed, but also refused to order a discharge of plaintiff, and continued the proceedings to a later hour. Later in the day, plaintiff appeared and again demanded trial; but the mayor again declined to proceed, and appointed a still later hour for the hearing. At the hour named, plaintiff again appeared; and for a third time the mayor refused to proceed, but refused to discharge plaintiff, telling him that he considered him still under arrest. Several days later the plaintiff made his final appearance, and was told there was no complaint against him. No information was, in fact, ever filed against him, and no case was ever docketed against him by the mayor. Plaintiff alleges that the arrest was illegal and wanton, and put him to expense and loss of time, and sets out various matters, having more or less support in the testimony, tending to show that said arrest was made in a manner and under circumstances causing him humiliation and disgrace. The defendants deny the plaintiff's claim, and allege that, in all they did in reference to the matters of which complaint is made, they acted in their official capacity and in good faith. The jury returned a verdict for the plaintiff for \$400.

I. It is first argued by appellants that there were no allegations of special damages by the plaintiff, and that much of the testimony as to loss of time and other circumstances was inadmissible. It is true, the petition does not set out any specific item or amount as claimed for loss of time, but it does allege the fact that plaintiff was deprived of his liberty; and this, we think, sufficiently implies a loss of time.

1. ARREST: allegation of: loss of time.

Error is further alleged upon the ruling of the court permitting plaintiff to testify that the arrest was made in the presence of his mother, wife, and son. The ruling was correct. While loss of time and expense are usual incidents to claims like the one in suit, the principal ground of recovery in most cases of this kind is the shame and humiliation to which the injured party has been wrongfully subjected. These consequences of the wrongful act depend in a great degree upon the circumstances of time, place, and publicity by which it is attended. We have held that, in a civil action for assault and battery, it is proper to show in aggravation of damages the presence of others at the time of the injury, because "an insult or indignity which is suffered in the presence of others is more humiliating than the same wrong would be if perpetrated in private." *Root v. Sturdivant*, 70 Iowa, 58. The same rule was adhered to in an action for malicious prosecution. *Flam v. Lee*, 116 Iowa, 289. We are cited to no authority to the contrary, nor do we think that any can readily be found. The cases referred to by counsel go only to the proposition that, in an action to recover damages sustained by reason of a defendant's negligence plaintiff cannot be allowed to appeal to the sympathy of the jurors by testimony as to his family and family relations. *Kreuziger v. R. R.*, 73 Wis. 158 (40 N. W. Rep. 657). Other points are made upon the introduction of evidence, but do not raise questions of importance, and it is sufficient to say we think there was no prejudicial error in the rulings excepted to.

II. At the close of the testimony the appellant Gormley moved for a directed verdict in his behalf, and, this motion being denied, error is assigned upon the ruling.

The first ground of this contention is that there is no evidence justifying the conclusion that Gormley was in any manner responsible for plaintiff's arrest. We do not so understand the record.

2. EVIDENCE
in aggravation
of
damages.

1. ILLEGAL ar-
rest: respon-
sibility of
mayor: evi-
dence.

While the testimony of Geiger is apparently contradictory upon this particular matter, he is represented in at least one place as testifying that he was acting under Gormley's orders. Moreover, both he and Gormley admit that the latter directed the former to protect the street commissioner in tearing down plaintiff's fence, and to keep the alleged street open, and to prevent the fence being rebuilt. This, followed by his recognition of the arrest, his refusal to discharge the plaintiff, and causing him to repeatedly appear in the mayor's court before informing him that there was no case against him is certainly sufficient to sustain a finding by the jury that he and the marshal were acting conjointly in this effort to overcome plaintiff's resistance to their attempt to oust him from the land in dispute.

But it is further insisted that no cause of action was shown against Gormley because the acts complained of were performed in his capacity as mayor. Unfortunately

4. **INTERFER-** that fact, if admitted, does not necessarily
ENCE with constitute a defense. If a mayor, conceiving
 private prop-
 erty: author-
 ity of city
 officials:
 arrest. of land in the possession of a citizen, forcibly
 ejects the latter without legal process, or if he directs the
 marshal to take such measures, he acts at his peril, not-
 withstanding his entire good faith and honest belief that
 he is strictly within the limits of his authority. If in fact
 the town have no title to the land, and no right to throw
 it open as a street, he and all others who are actively
 engaged in the invasion of the citizen's property are tres-
 passers, notwithstanding their official character; and the
 owner of the property has the same right to defend his
 possession against them that he may employ against un-
 official assailants. In other words, the municipal corpora-
 tion and its officers have no more authority, as such, to
 dispossess a citizen without legal process, than one citizen
 has to dispossess another. The courts are open to all per-

sons and municipalities for the settlement of such disputes, and, when settled, proper orders and writs may be obtained to place and keep the rightful owner in possession. In the case before us no attempt whatever was made to show that the land in dispute is a street. On cross-examination of the plaintiff's witnesses it was drawn out that more than forty years ago a tract of land, including the alleged street, was platted and mapped with lots as Young's addition to Mt. Vernon, and the land in controversy is a strip between lots numbered three and four; but whether such plat was ever acknowledged and recorded as provided by law, or was ever recognized or accepted by the town, is left wholly to conjecture. The plat itself is not in evidence. The property has been occupied for at least forty-five years for residence purposes. The plaintiff's residence extends several feet into the alleged street on one side, and another residence extends into it from the other. For forty years the entire tract has been inclosed, occupied, and improved as a part of the homestead property, and upon the street front a sidewalk has for a long time been maintained.

No excuse or justification is offered for the movement against plaintiff and his property, except the advice of counsel to the effect that it would be wise "to go on and treat the street as a public street, and throw it open to the public," and thus bring on an action by the plaintiff in which the legal rights of the parties might be settled. This advice did not go to the extent of suggesting the arrest and punishment of plaintiff if he resisted this method of eviction, and, even if it had, we cannot conceive that advice of counsel is a sufficient justification in an action for false imprisonment. It may be material to rebut any presumption of malice, and thus to defeat a demand for exemplary damages, but will not deprive the plaintiff of his right to recover actual damages. *Frazier v. Turner*, 76 Wis. 562 (45 N. W. Rep. 411); *Fire Ass'n v. Fleming*,

78 Ga. 733 (3 S. E. Rep. 420); *Josselyn v. McAllister*, 22 Mich. 300. The law jealously guards the liberty of the citizen, and the public officer who interferes with that right must be acting within the scope of his authority or jurisdiction to escape personal liability therefor. Within that limit he may act, and be safe against civil liability in damages, even though he act mistakenly, or, as is held in some cases, even though he act corruptly or maliciously. But for an act which is clearly and unquestionably beyond his jurisdiction—an act for which he has no authority, in law, under any circumstances—he is answerable to the same extent as is the private citizen. *Thompson v. Whipple*, 54 Ark. 203 (15 S.W. Rep. 604); *Burlingham v. Wylee*, 2 Root., 152; *Davis v. American Society*, 75 N. Y. 362.

No officer may rightfully arrest or cause the arrest of another without warrant, except as provided by statute. It is unnecessary, however, to discuss this aspect of the situation, for plaintiff was charged with no offense, and appellants do not plead or seek to prove any act on his part exposing him to arrest. So far as shown, he was upon his own premises. The officers of the town, without warrant and without legal process, and against his express protest, proceeded to tear down his fence. He had the right to resist this attack with the use of such reasonable force as was necessary to protect his possession, and his arrest was clearly unauthorized and wrongful.

III. Exceptions are taken to the instructions given the jury. Most of the questions thus presented are governed by the propositions already discussed, and we need not further consider them. It is said the jury

5. ASSESSMENT
of damages:
mental pain. were not properly instructed as to the measure of damages, in that the court after withdrawing the claim for exemplary damages, said to the jury that, if they found for the plaintiff, they should assess in his favor such sum as, in their judgment as reasonable and prudent men, would fairly compensate him for his expenses and loss of

time, and for such mental suffering and humiliation as he sustained by defendants' wrongful act. Counsel say, "It is not the rule that a jury are to fix the amount of compensation upon their own opinion and judgment as reasonable and prudent men." But if this is not the rule, the argument does not favor us with any statement of its proper form or substance. Of course, if the language quoted is to be interpreted as giving the jury license to fix a recovery without regard to the testimony, then it is wrong; but the instruction, as written, distinctly negatives that idea. In the very nature of things, it is not possible for the injured party to open up his mental and emotional experiences in such manner that the jury may examine them as they would examine a map or chart, or may compute and measure his compensation as they would compute the sum due on a promissory note; but, the facts and circumstances of the alleged wrong being given, the jury must be permitted to take them, and therefrom to fix the compensation which they, as fair-minded men, may believe to be just and reasonable. Mental suffering and its extent are ordinarily to be inferred from the nature of the injury itself. *Stone v. Heywood*, 7 Allen, 118. And many cases hold that no evidence other than that of the injury itself is required to justify the jury in assessing damages for consequent mental pain. *St. Louis, etc., v. Trimble*, 54 Ark. 354 (15 S. W. Rep. 899); *Boldt v. Budwig*, 19 Neb. 739 (28 N. W. Rep. 280). The impossibility of formulating any exact rule or standard for measuring compensation in dollars and cents for physical or mental suffering is recognized by the courts, but "the law does not refuse to take notice of such injury, on account of the difficulty of ascertaining its degree." *Ballou v. Farnum*, 11 Allen, 73. It is better to leave the assessment of damages to the jury, "under the wise supervision of the presiding judge with his power to set aside excessive verdicts, than on accounts of such difficulty to require parties injured in their

feelings by the negligence, malice, or wantonness of others to go without remedy." *Young v. W. U. Tel. Co.*, 107 N. C. 870 (11 S. E. Rep. 1044, 9 L. R. A. 669, 22 Am. St. Rep. 888); *Sloane v. R. R.*, 111 Cal. 668 (44 Pac. Rep. 820, 82 L. R. A. 198). Strictly speaking, the word "compensation," as used in this connection, does not adequately express the idea intended, but is usually employed for want of a better phrase to express the thought which underlies the right of recovery for such injuries. It is not a matter of price or market values, but is a substantial award for injuries for which there is no other legal redress, and its amount is left to the sound discretion of the jury. *Morris v. R. R.*, 45 Iowa, 30; *Goodhart v. R. R.*, 177 Pa. 1 (85 Atl. Rep. 191, 55 Am. St. Rep. 705); *Morgan v. R. R.*, 95 Cal. 501 (80 Pac. Rep. 601); *Head v. R. R.*, 79 Ga. 358 (7 S. E. Rep. 217, 11 Am. St. Rep. 484); *Ives v. Humphreys*, 1 E. D. Smith, 196. We find no error in the instructions of the trial court in this respect. Neither can the appellants' objection that the damages found are excessive be sustained. The recovery is not so great as to appear to have been the result of prejudice, partiality, or corruption, and we are not authorized to interfere with it.

Nor is it necessary for us to conclude that exemplary damages were allowed. Counsel seem to proceed upon the theory that plaintiff's loss of time and expenses for attorney's fees constitute the only actual
o. SAME. damage done, and that the damages in excess of such sum are exemplary, and consequently against the instruction of the court withdrawing such claim. Damages for mental pain and suffering, under the rule followed in this state, are treated as actual, not punitive; and, the case having been properly submitted to the jury on that theory, the objection made is not well taken.

The judgment appealed from is **AFFIRMED**.

M. J. COLLINS, Appellant, v. RICHARD PADDEN, Appellee.

120	381
139	306

Agency: SALE OF LAND: RIGHT TO COMMISSIONS. Where a real estate broker contracts with his principal to find a purchaser for his farm at a stated price for an agreed commission and performs his part of the contract, the fact that the principal reserves the right to prescribe the terms of sale when a purchaser is found will not defeat the agent's right to his commissions.

Appeal from Pocahontas District Court.—HON. A. D. BAILIE, Judge.

THURSDAY, MAY 14, 1908.

ACTION by plaintiff, a real estate agent, to recover commissions claimed to be due him from defendant on account of an alleged real estate transaction. The facts necessary to be considered are stated in the opinion. A jury was impaneled, and at the close of the evidence for plaintiff the court, on motion, directed a verdict in favor of defendant, and entered judgment against plaintiff for costs. Plaintiff appeals.—*Reversed.*

W. J. Collins and Kenyon & O'Connor for appellant.

Healy Bros. & Kelleher for appellee.

BISHOP, C. J.—In the petition it is alleged that an oral agreement was entered into between plaintiff, a real estate dealer, and defendant, the owner of an eighty acre farm in Webster county, whereby plaintiff was to find a purchaser for such farm, and for his services in that behalf was to have a sum representing the excess in selling price over and above \$47 per acre. It is further stated that the terms in respect of payment of the purchase price upon which defendant would sell were not definitely stated or

agreed upon, but that it was said by defendant, in substance, that a cash payment of \$500 or \$1,000—the balance to be secured by a mortgage on the farm, and to draw interest at six per cent.—would be satisfactory. It is then alleged that a purchaser was found by plaintiff, who was able, ready, and willing to buy, but that defendant refused to complete the sale, and has refused to pay plaintiff for his services. The evidence introduced by plaintiff tends to prove that he found in one Voight a person willing to purchase the lands at the price of \$50 per acre; that plaintiff brought said Voight and defendant together, and that terms of sale were readily agreed upon between them (that is, that said Voight should pay in cash the sum of \$500, and all the balance of the purchase money in the month of January following). It is made to appear that thereafter defendant refused to execute the papers and carry out the deal, no other reason appearing than that plaintiff demanded payment of the full commission agreed upon as alleged by him.

We have repeatedly held that where an agent is employed to make a sale of real estate, his right to compensation is fixed when he has furnished a customer who is able, ready, and willing to purchase on the terms prescribed by the owner of the property. *Ford v. Easley*, 88 Iowa, 605; *Blodgett v. Railway*, 63 Iowa, 609. To entitle the agent to recover, it is not necessary that he show that a sale was consummated. In this case it is contended by appellee—and such seems to have been the thought of the trial court—that no recovery can be had for the reason that by the agreement between plaintiff and defendant the terms of sale were not definitely stated, and, defendant having reserved the right to dictate terms in case a purchaser should be found, he might lawfully refuse to sell altogether, in which event no commission could be claimed. With this contention, as a whole, we cannot agree. What was to be the rate or amount of commission paid in case a

competent and satisfactory purchaser was found, appears in the record without dispute. Now, granting that the terms under which defendant might consent to sell were not definitely settled or agreed upon, still, if plaintiff found and introduced to him a purchaser who proved to be satisfactory, and terms fully as favorable as any defendant had ever suggested he would require were readily agreed upon, we see no good reason why it should not be said that thereupon plaintiff became entitled to his compensation. As far as appears, the only reason assigned by defendant for refusing to make the sale was because plaintiff would not consent to accept \$100 for his services in lieu of the amount agreed upon as alleged. The good faith and character of the proposed purchaser are not assailed, nor the transaction otherwise questioned. Under the circumstances presented, we think that defendant could not avoid liability to his agent by simply refusing to sell for the reason stated, and accordingly that the trial court erred in sustaining the motion for a verdict. In reaching this conclusion, we have given plaintiff the benefit of the most favorable construction of the evidence reasonably possible, and this in accordance with the well-known rule applicable to such cases.

The judgment is reversed and cause remanded for a new trial.—REVERSED.

FRANK SHINN, Appellant, v. F. M. CUNNINGHAM, R. V.
INNES, Auditor, WM. AREND, Treasurer, AND HENRY
BRANDES AND OTHER SUPERVISORS OF POTTAWATTAMIE
COUNTY, IOWA, Appellees.

120	383
121	558

Taxation: DISCOVERY OF OMITTED PROPERTY. 'A board of super-
1 visors had authority under Code, section 1374, to contract
with a party to discover taxable property, which, through
fraud or for other cause, had been omitted from taxation.

Contract to Discover: VALIDITY OF. In the absence of evidence
2 of the value of services in discovering for taxation omitted
property, the court cannot say as a matter of law that the con-
tract is unreasonable or the compensation paid excessive.

Treasurer: DUTY TO DISCOVER. A county treasurer is not charged
3 with the duty of discovering property for taxation which has
been omitted by fraud or otherwise.

Champerty. It is competent for a county in making a contract to
4 discover taxable property to agree as to the payment of the
expenses incurred thereby, and the same is not champertous.

Validity of Contract: SUBSEQUENT LEGISLATION. Chapter 50, Acts
5 of the 28th General Assembly, limiting the compensation for
the discovery of taxable property to fifteen per cent of the tax
recovered did not affect a contract made prior to its enactment.

Appeal from Pottawattamie District Court.—HON. O. D.
WHEELER, Judge.

FRIDAY, MAY 15, 1908.

THE opinion states the case.—*Affirmed.*

J. J. Hess and Ira R. Stitt for appellant.

Stone & Tingley and Saunders & Stuart for appellees.

WEAVER, J.—On November 18, 1899, the board of supervisors of Pottawattamie county entered into a contract with the defendant Cunningham, by the terms of which the latter undertook to investigate and discover taxable property in said county which, through fraud or otherwise, had been omitted from taxation, and report the same to the proper officers of the county. It was further provided by said contract that Cunningham should pay all cost and attorney's fees incurred by the county in making collections of taxes thus assessed, and as compensation for his services was to be paid one-half of all the moneys collected from such taxes. Thereafter the plaintiff, a resident taxpayer of the county, brought this action in

equity to enjoin the performance of said contract, and the payment of any money thereunder to Cunningham, and as grounds for such relief alleges that the board of supervisors had no authority or power to enter into such an agreement; that the work contracted for required no special skill, and the agreed compensation is excessive, unreasonable, and void upon considerations of public policy; that since the making of said contract a statute has been enacted limiting compensation for such services to fifteen per cent. of the amount recovered; and that section 1374 of the Code of 1897, providing for the collection of omitted taxes, is unconstitutional. The answer of Cunningham admits the making of the contract, and alleges that after the making thereof, and before the commencement of this suit, he had in fact performed the service therein agreed to; that in so doing he expended twelve months' valuable time, and has been to large expense for assistance, all of which was well known to plaintiff, and to the taxpayers generally; and that plaintiff is thereby estopped to deny his right to recover payment. At the close of the trial the court found for defendants, and dismissed the petition. Plaintiff appeals.

I. We had recent occasion to consider the power of the board of supervisors to enter into a contract of this kind under the statute as it existed at the date of the transaction in controversy. *Disbrow v. Board*, 119 Iowa, 537. The conclusion there reached affirmed the existence of such power, and held the agreement not contrary to public policy. It would be unprofitable to review again the authorities upon this feature of the case. No good reason is suggested for overruling the decision there announced, and we are content to recognize its authority.

II. It is said that the compensation agreed to be paid is excessive and unreasonable, and the contract should

therefore be declared void in the interest of the public.

2. **CONTRACT** While such is the allegation of the petition,
to discover: and the point is urged in argument, not a
validity of. word of testimony appears in the record to show the fair
and reasonable value of the services. It may be true that
fifty per cent. is an excessive compensation for hunting
up property escaping taxation by ordinary methods, and
collecting the revenue therefrom, but the court cannot
presume such to be the fact. It must be proved, and in
the absence of any evidence in support of the allegation
the appeal presents nothing upon this issue for our con-
sideration.

But counsel say that the work is properly the duty of
the county treasurer, and that he could employ deputies
to perform it. If this be a material consideration, it may
be said the statute does not make it the duty
2. **TREASURER:** of the treasurer to investigate and discover
duty to dis- property omitted from the assessment. It charges him
cover. with no duty in respect thereto until he is "apprised" of
such omission (Code 1897, section 1374); and the fact that
he could, if permitted, employ deputies to do the work
confided to Cunningham has no bearing upon the validity
of the contract in dispute, nor can we assume without
testimony that such method of collection would be less
expensive for the county than the one which was adopted.
The contract has no reference to taxes upon property duly
listed or assessed, for the collection of which the proper
officers are clothed with ample powers. It assumes the
possibility of the existence of property concealed or with-
held from assessment, and not in any manner appearing
upon the tax books. Plaintiff undertook to make search
for and develop the existence of such property, and bring
it to the attention of the officer having the legal authority
to enter up the tax and enforce collection thereof. If,
then, in view of the uncertainty concerning the amount of
revenue which may thus be realized, and of litigation

likely to ensue from the enforcement of such measures, the board of supervisors believe it wise to protect the county by a contract providing that plaintiff's compensation for the work thus performed shall be wholly contingent upon the amount of taxes collected, and requiring him to assume the burden of all cost and attorney's fees thus incurred, it is easily possible that this method of discovery and collection may prove the most practicable and least expensive. At least, we cannot say, as a matter of law, that it is unreasonable or unjust.

The further objection that the contract is champertous is not well taken. The agreement, as we construe it, is not of champertous nature. Under the contract both the county and Cunningham were directly interested in collection of these taxes, whether by suit or otherwise, and it was competent for them to agree in advance as to how the expenses thereby incurred should be borne.

4. CHAMPERTY. III. The statute subsequently enacted (Acts 28th General Assembly, page 33, chapter 50), limiting the payment for the discovery of property omitted from taxation to fifteen per cent. of the taxes thus obtained, having become a law after the contract in suit was entered into and the services in part performed, cannot affect the rights of the parties to this litigation. It should further be noticed that the limitation of fifteen per cent. applies to compensation for services rendered and expenses incurred in assisting the proper officers "in the discovery of property not listed and assessed," while by the contract before us the plaintiff undertook not only to assist in "discovering" the property, but also to assume the burden of the expenses, attorney's fees, and costs incurred in enforcing collection of the taxes upon the property so discovered—an obligation much more onerous than is to be implied from the language of the statute. The principle cited in argument that an "officer

5. VALIDITY of contract: subsequent legislation.

acquires no vested right in a public office" has no application here, by analogy or otherwise. If the board of supervisors had the power to enter into this contract, as we have held it had, it was not within constitutional power of the legislature to impair that contract, and compel Cunningham to accept a less compensation than was promised him. The valid contract of a municipal corporation is just as sacred from legislative interference or destruction as is one made between individual citizens. No precedent has been noticed to the contrary, and the general principle is too familiar to justify reference to authorities. The question raised as to the effect of this contract upon the rights of school districts, towns, and cities whose taxes are collected by Cunningham we cannot undertake to decide. These municipalities are not in court, and so far as this record shows are not complaining.

It is but fair to appellant to state that at the time this suit was begun some of the principal propositions presented by him had not been definitely settled by this court. The meaning and effect of some of the changes made in the tax statute by the Code of 1897 were then involved in considerable doubt, and became the source of no little litigation.

Decisions since made have foreclosed discussion upon many of the points raised, and robbed this case of much of the importance it would otherwise possess.

The judgment of the district court is right, and is
AFFIRMED.

CHAS. T. OFFICER, Administrator of the Estate of Thomas Officer, Deceased, Appellee, v. OFFICER AND PUSEY, JOHN BERESHEIM AND L. T. MURPHY, Receivers, J. J. STEWART, as Executor of the Estate of A. Cochran, Deceased, Intervener, Appellant.

120	389
120	700
120	702
120	389
127	350
120	389
128	276
128	278
128	596
128	599
120	389
134	230
120	389
139	60
139	92

Executors: DEPOSIT OF TRUST FUNDS. An executor may right-
1 fully deposit trust funds to the account of the estate in a solvent bank.

General Deposit. Where an executor deposits trust funds with a
2 bank, which are subject to check, there being no agreement to return the identical deposit or to apply the same to any specific purpose, the deposit is a general one.

Trust Funds: DEPOSIT: PREFERENCE. Where an executor makes a
3 general deposit of trust funds in a solvent bank, neither he nor the *cestui que* trust, in case of a failure of the bank, has any preference over other creditors, though the bank knew the character of the deposit.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

FRIDAY, MAY 15, 1903.

APPLICATION in a receivership proceeding for the allowance and establishment of a claim filed by the intervener, as executor of the estate of A. Cochran, deceased, as a preferential one. The trial court denied the application, and intervener appeals.—*Affirmed.*

C: G. Saunders and J. J. Stewart for appellant.

Harl & McCabe for appellee.

DEEMER, J.—The firm of Officer & Pusey was a partnership doing a general banking business in the city of Council Bluffs. On September 17, 1900, it went into the

hands of receivers, and, on October 16th of the same year, intervener, as executor of the estate of A. Cochran, deceased, filed his claim against Officer & Pusey with the receivers, for the sum of something more than \$2,000, which he had deposited in the bank to the credit of "the estate of A. Cochran, deceased. J. J. Stewart, executor." He alleges that he notified the bank that this was a special trust fund which should at all times be kept on hand and subject to the order of court, and that said Officer & Pusey had notice of the character of the funds. He further pleaded that the funds in the hands of the receivers were augmented to the amount of the deposit, and that the same, or an equal amount thereof, was still in their hands, and he asked that his claim be allowed and established as a preferred one. The facts are not in dispute. It was agreed that the claim should be treated as if made in the name of the *cestui que* trust; that J. J. Stewart was executor of the estate of A. Cochran, and as such deposited the money claimed by him, as stated in his application; and that such deposits were made on and after March 31, 1900, with the knowledge of the bank that they were trust funds held by Stewart. The deposits were made in good faith, and, when made, the bank was reputed to be solvent and sound. When the bank passed into the hands of the receivers there was more than \$100,000 of assets, which was more than sufficient to pay all preferred claims; and from the time the deposits were made, down to the time of the appointment of the receivers, the bank had more than \$100,000 in cash. Stewart never had an order of court to make the deposits, but acted upon his own judgment and responsibility, for the purpose of preserving and securing the funds. From time to time he drew checks in his official capacity against the funds, which were duly honored and paid.

The first question of law to be determined on this state of facts is, was the deposit wrongful? If so, and

the bank had notice of the character of the funds, there is

1. **EXECUTORS:** no doubt that the claim should be given a deposit of trust funds. preference. *Ind. Dist. v. King*, 80 Iowa, 498; *Davenport Plow Co. v. Lamp*, 80 Iowa, 722; *Dist. Tp. v. Bank*, 88 Iowa, 194; *In re Knapp & Co.*, 101 Iowa, 488; *Jones v. Chesebrough*, 105 Iowa, 303. An executor must exercise that degree of care and prudence with reference to funds coming into his hands that ordinarily prudent men exercise in regard to their own affairs, and, in the absence of statute preventing, they may deposit the same in banks of good standing and reputed solvency. *Barney v. Saunders*, 16 How. 535 (14 L. Ed. 1047); *King v. Talbot*, 40 N. Y. 76. Indeed, it seems to be generally held that a trustee who has deposited funds to a trust account in a reputable bank or banking house is not liable for any loss which may occur through failure of the bank. *In re Law's Estate*, 144 Pa. 499 (22 Atl. Rep. 831, 14 L. R. A. 108); *Norwood v. Harness*, 98 Ind. 134 (49 Am. Rep. 789); *Jacobus v. Jacobus*, 37 N. J. Eq. 17; *People v. Faulkner*, 107 N. Y. 488 (14 N. E. Rep. 415). Of course, the deposit must be made to the trust account. If the executor or trustee makes a deposit of trust funds in his individual name, or mingles them with other funds, he is not relieved of responsibility should the funds be lost. *Williams v. Williams*, 55 Wis. 300 (12 N. W. Rep. 465, 13 N. W. Rep. 74, 42 Am. Rep. 708); *Allen v. Leach* (Del. Orph. Ct. Rep.) 29 Atl. Rep. 1050; *Corya v. Corya*, 119 Ind. 593 (22 N. E. Rep. 3). Such act is in itself a conversion of the funds. *Ivey v. Coleman*, 42 Ala. 409.

Finding, then, that the executor was authorized to make a deposit of the money belonging to the estate, the next question is the nature of the deposit. Deposits are divided into general, special, and specific; and, in the absence of proof to the contrary, every deposit is presumed to be general. In cases of general deposit, the money deposited is mingled with other

2. **GENERAL deposit.**

money of the bank, and the entire amount forms a single fund, from which depositors are paid. The relation of debtor and creditor is created, and, in the event of failure of the bank, all such creditors stand on an equality. *Lowry v. Polk County*, 51 Iowa, 50; *Long v. Emsley*, 57 Iowa, 11; *Commonwealth Bank v. Wister*, 2 Pet. 318(7 L. Ed. 437); *In re Hunt*, 141 Mass. 515 (6 N. E. Rep. 554); *Briyn v. Bank*, 9 Com. 413. A general deposit differs from a loan in that the money is left with the bank for safekeeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or may not bear interest, and, so long as the relation is simply that of debtor and creditor, no loan is created. *In re Law's Estate, supra*. A special deposit is created where the money is left for safekeeping and return of the identical thing to the depositor. And a specific deposit exists when money or property is given to a bank for some specific and particular purpose, as a note for collection, money to pay a particular note, or property for some specific purpose. *People v. Bank*, 96 N. Y. 33; *Brahm v. Adkins*, 77 Ill. 263; *Peak v. Ellicott*, 30 Kan. 156 (1 Pac. Rep. 499, 46 Am. Rep. 90); *German Bank v. Foreman*, 138 Pa. 474 (21 Atl. Rep. 20, 21 Am. St. Rep. 908). The deposit made in this case was not a special one. The bank did not receive it upon a promise to keep the identical money and to return it to the executor. It was not specific, for the bank had the right to mix the funds with other money received by it, and obligated itself simply to honor and pay the executor's checks. It did not agree to hold the same for the parties entitled thereto, but it was at all times authorized to pay out the same on checks signed by the executor, and was not bound to see that the money received thereon went to those who were entitled to receive it. Many attempts have been made to secure priority in such cases on the theory that the deposit is specific, but they have uniformly failed. See *Fletcher v. Sharpe*,

108 Ind. 276 (9 N. E. Rep. 142); *McLain v. Wallace*, 103 Ind. 562 (5 N. E. Rep. 911); *Alston v. State*, 92 Ala. 124 (9 South. Rep. 782, 13 L. R. A. 659); *Henry v. Martin*, 88 Wis. 867 (60 N. W. Rep. 263).

We have found that the deposit in this case was authorized, and that it was general in character, and the question yet remains, may the executor or his *cestui que* trust

3. Trust funds: recover the deposit as a preferred claim? The deposit: mere fact that he is a trust fund creditor does not give him this right. Equality is regarded as equity in such cases. He is simply a creditor of the bank, and has no peculiar claim or right over other creditors. *Ringo v. Field*, 6 Ark. 43; *Fletcher v. Sharpe*, *supra*; *Shaw v. Bauman*, 34 Ohio St. 25; *Paul v. Draper*, 158 Mo. 197 (59 S. W. Rep. 77, 81 Am. St. Rep. 296); *Nat'l Bank v. Mil-lard*, 10 Wall. 153 (19 L. Ed. 897). In *Fletcher v. Sharpe*, *supra*, it is said: "There is no question that the fund was properly deposited. * * * When deposits are received, unless they are special, they belong to the bank as a part of its general funds, and the relation of debtor and creditor arises between the bank and the depositor. This is equally so whether the deposit is of trust money or of funds which are impressed with no trust, provided the act of the depositor is no misappropriation of the funds. If, in receiving a trust fund, a bank acted with knowledge that it was taking the fund in violation of the duty of the trustee, the rights of a *cestui que* trust might be different. * * * In this case, where no impropriety is imputed to the bank in receiving the money, it becomes the debtor of the petitioner, and its debt to them was of the same character as its debt to any other depositor, and must be paid in the same proportion. The rights of other creditors stand on a level with those of the petitioners, and are to be guarded and protected by the court with the same vigilance." This is manifestly sound doctrine, and does not in any manner controvert the rule that a *cestui que* trust may follow

trust property which has been misapplied or misdirected by a trustee into the hands of anyone who is not an innocent purchaser for value. Generally speaking, equity will follow a trust fund through any number of transmutations, and preserve and protect it for the real beneficiary, so long as it can be identified and followed; and no court has gone farther than our own in this respect. But where the property has rightfully been disposed of by the trustee, and title has passed from him, the *cestui que* trust will not be permitted to reclaim the same. Hence the necessity for determining the rightfulness of the deposit. When it is once determined that the deposit was rightful, the case assumes the same aspect as if the *cestui que* trust had expressly authorized it. Had he done so, of course he could not follow the property into the hands of the receivers. In virtue of the power conferred upon him by law, the executor deposited the money in the bank, and thus became the bank's creditor for the amount of the deposit. The money was properly mingled with other funds of the bank, and lost its distinctive character as trust funds. The bank became obligated to return a like amount to the executor, or to honor his checks issued against the deposit. In other words, it became the debtor of the trustee. And, as said in *Bradley v. Chesebrough*, 111 Iowa, 126, referring to *Cavin v. Gleason*, 105 N. Y. 262 (11 N. E. Rep. 504), "that plaintiff was a trust creditor does not of itself entitle him to preference over other creditors." The executor had the right to make the deposit, and the bank had an equal right to use it in its business in the ordinary way. The fund stood on the same footing as any other general deposit. *McAfee v. Bland*, 11 Ky. 1 (11 S. W. Rep. 439).

The case is easily distinguishable from cases where the deposit is wrongful, for there the relation of debtor and creditor does not exist; at any rate, the *cestui que* trust is not bound by such a deposit. It is also very different from those cases where a bank, with notice of the trust

character of a deposit, attempts to apply it on a debt due it by the trustee. In such cases, the *cestui que* trust may recover the amount so misapplied from the bank. It is doubtless true, also, that the *cestui que* trust may recover from a solvent bank the amount of a deposit by another to his account as trustee, but none of these rules are applicable here, for the reasons that the deposit was rightful, the relation of debtor and creditor was created, and the entire assets of the bank are now in the hands of trustees for an equitable and proper distribution. There is no reason, then, for preferring one creditor over another, and surely none will be preferred simply because he is what might be called a trust fund creditor.

In *Cavin v. Gleason*, 105 N. Y. 256 (11 N. E. Rep. 504), relied upon by appellant, a trustee who had wrongfully dissipated and lost a trust fund made an assignment for the benefit of creditors and the *cestui que* trust sought to have a preferential claim established out of the assets of the trustee. The claim was denied, because the *cestui que* trust could not show that the funds were included in the assets, either in the original or a traceable form. The court there said: "It is clear that a trust creditor is not entitled to a preference over general creditors of an insolvent merely on the ground of the nature of his claim; that is, that he is a trust creditor, as distinguished from a general creditor. * * * The equitable doctrine, that as between creditors equality is equity, admits, so far as we know, of no exception founded on the greater supposed sacredness of one debt, or that it arose out of a violation of duty, or that its loss involves greater apparent hardship in one case than another, unless it appears, in addition, that there is some specific, recognized equity, founded on the relation of the debt to the assigned property, which entitles the claimant, according to equitable principles, to preferential payment. If it appears that trust property specifically belonging to the trust is included in the assets, the court,

doubtless, may order it to be restored to the trust. * * * This rule simply asserts the right of the true owner to his own property." This rule was approved in *Bradley v. Chesebrough, supra*. It manifestly has no application where the trustee has rightfully disposed of the trust property, and the *cestui que* trust is attempting to enforce a preferential claim against the debtor for that property.

In the case of *Jones v. Chesebrough, supra*, it was assumed, without deciding the point, that money rightfully deposited might be followed into the hands of an assignee of an insolvent bank. But as the case turned on the claimant's inability to trace his property, there was no necessity for deciding the other point, and that case should not be regarded as an authority in support of intervenor's claim.

None of the cases cited by appellant reach the exact point for decision here, and we have been unable, after a somewhat laborious search, to find any that does sustain his contention. On the other hand, there is abundant authority for the positions we have taken, which are to the effect that the deposit was rightful, was general in character, and that the executor, or the estate which he represents, is a creditor of the bank, having no peculiar equities over those of any other creditors, and consequently is not entitled to have his claim established as a preferential one.

The ruling of the district court was correct, and it is
AFFIRMED.

120	396
134	206

ALVINA SCHICK *et al.*, Appellants, v. D. H. H. STUHR,
Appellee.

Guardianship: AUTHORITY FOR APPOINTMENT. The fact that a man
1 seventy-five years of age, owing to temperament and immoral habits, may develop a disposition to squander his property, while in his business affairs he has been and still is ordinarily

prudent and thrifty, will not warrant the appointment of a guardian for him as a person of unsound mind, under Code, section 3219.

Same. The fact that one of high temper and immoral tendencies may commit wrongs rendering him liable to respond in damages will not authorize the appointment of a guardian, as his estate would be equally as liable in the hands of a guardian.

Appeal from Scott District Court.—HON. J. W. BOLLINGER, Judge.

FRIDAY, MAY 15, 1903.

ACTION brought for the appointment of a guardian for defendant, who is alleged to be of unsound mind. Defendant is seventy-five years of age, and the plaintiffs are his children. There was a jury trial, and a verdict finding defendant to be of unsound mind. On his motion, such verdict was set aside, and a new trial granted. The plaintiffs appeal.—*Affirmed.*

W. M. Chamberlain and *Schmidt & Vollmer* for appellants.

Louis Block for appellee.

BISHOP, C. J.—The verdict of the jury was set aside simply for the reason that the same was not warranted by the evidence produced upon the trial. In passing upon the motion, the trial court took occasion to sum up the evidence, and what was then said has been preserved, and is incorporated in the record before us. Therefrom we quote: "The most favorable testimony for plaintiffs' side shows that defendant was suspicious of his wife's virtue; falsely accused her of undue intimacy with many men; was afraid she would poison him, or at least said he was; had a violent temper; was often guilty of barbarous treatment towards his children and invalid wife; exposed his person to two or three respectable ladies; had illegitimate

children; settled two bastardy suits; was a sexual pervert." We have read the entire record, and reach the conclusion that the statement so made by the trial court presents as fairly as the record warrants the evidence upon which the finding of the jury was based. On behalf of defendant it is made to appear that, by thrift and good management, he has accumulated considerable property, all of which is safely invested, and the income from which is at least \$1,500 per annum. No evidence was introduced tending to prove that he had ever made or entered into any business transaction against his interest. On the contrary, it was made to appear that he fully comprehended the details of his business affairs, was close and exact in his dealings, and exercised ordinary sagacity and discretion in all transactions affecting his property rights. Such, in brief, was the evidence upon which the verdict was predicated; and the question before us is whether there was an abuse of discretion on the part of the trial court in refusing to accept of the verdict, and make an appointment based thereon. That we will not interfere with an order granting a new trial, save that an abuse of discretion is made to clearly appear, is a rule to which we have constantly adhered. We need not cite the many cases in which it is announced. In view of the fact, however, that two trials have been had upon the issue here joined, each trial resulting in a verdict finding the defendant to be of unsound mind, we are disposed to a more critical analysis of the record than might be otherwise necessary. We have read the record with this thought in mind, and at the end we find ourselves confronted with the single and simple question whether the foregoing statement of facts, being established, not only warrants the appointment of a guardian, but is such that a refusal to appoint, based thereon, would amount to an abuse of discretion.

Section 3219 of the Code authorizes the appointment of a guardian for a person of unsound mind, satisfactory

proof having been made. Several times this section has been considered and construed. In *Emerick v. Emerick*, 83 Iowa, 411, the subject was very fully discussed by Robinson, J. In the course of the opinion it is said: "The statute is silent as to what shall constitute the unsoundness which it contemplates, but it is clear that it relates to the capacity of the person affected to transact business. The protection of property is one of the main objects of such statutes as that under consideration, and the test of the unsoundness in question is largely the incompetency of the person to manage property in a rational manner." And again: "If the defendant is capable of transacting the ordinary business involved in taking care of his property, and if he understands the nature of the business and the effect of what he does, and can exercise his will with reference to such business with discretion, notwithstanding the influence of others, he is not of unsound mind, within the meaning of the statute, and should not be deprived of the control of his property." See, also, the following cases: *Seerley v. Sater*, 68 Iowa, 875; *Harrison v. Otley*, 101 Iowa, 652; *Garretson v. Hubbard*, 110 Iowa, 7.

It does not appear that defendant in this case is now actively engaged in any business. He owns considerable real estate, which is rented, and the remainder of his property is well and safely invested. As to this there seems to be no controversy.

The contentions of plaintiffs may be resolved into two: First, that, owing to his temperament of mind, and that he is a sexual pervert, it is probable that he may at any time develop a disposition to squander his property; second, that, for the same reasons, he may at any time commit wrongs such as to render him liable to respond in damages. As to the first proposition, it seems a sufficient answer to say that, should such disposition develop, a basis would be thereby at once furnished for the appointment of a guardian. It

1. GUARDIAN-SHIP: facts authorizing the appointment.

may be that this amounts to waiting for the mischief to begin before taking steps to guard against it. But were a rule to the contrary to be established, there would be authorized the appointment of a guardian for any man who might be shown to be possessed of eccentricities or peculiarities of disposition, or addicted to immoral habits, and this notwithstanding in business matters he appears to be ordinarily cautious and sagacious. The question is not to be disposed of by invoking the principle that it is better to prevent than to wait and attempt to cure, however salutary that principle may be as applied to the conduct of business on the part of individuals, but, rather, upon the broad principle that no man shall be interfered with in his personal or property rights by the government, under the exercise of its parental authority, until the actual and positive necessity therefor is shown to exist. It would be dangerous doctrine indeed to say that because it is possible, or even probable, that a person named may at some time in the future act unwisely or without discretion in respect of his business affairs, therefore all control over his property shall be taken away from him and confided to the custody of a guardian. Especially would this be true as applied to the case of a person whose entire business career had been marked by at least ordinary thrift, prudence, and sagacity.

The second proposition advanced by counsel for appellants is wholly untenable. A guardianship would be no protection as against the consequences of willful wrongs committed. If, mentally considered, the per-

2. SAME.

son in question be responsible at all, and by reason of his unusually high temper, or yielding to the immoral tendency of his mind, he should be led into a violation of established rules of law, his estate would be equally liable, whether in his own possession, or in the possession of a guardian. If, on the other hand, the person in question be not mentally responsible, then in no event

could his estate be charged with liability for wrongs committed by him involving the element of malice, inasmuch as there can be no such thing as malice where mental responsibility is wanting.

Such were the considerations, arising from the evidence found in the record, that prompted the trial court to refuse the appointment of a guardian upon the coming in of a verdict of the jury, and in accordance with the fact as found by such verdict. As to all the facts in the case, and as to the conclusions to be drawn therefrom in many respects, the trial court was in much better position to determine whether the verdict was warranted by the proof made, than we are. Taking the record as we find it, we cannot say that the refusal to appoint a guardian, and ordering a new trial, amounted to such an abuse of discretion as to demand at our hands an interference therewith. The order granting a new trial is accordingly **AFFIRMED.**

A. J. AUGUSTINE v. J. E. McDOWELL, Defendant, AND JAS. WINKLEMAN, Intervener, Appellant.

Sale of Standing Corn; TITLE. A written agreement to sell a
 1 certain number of bushels of corn to be taken from a standing field does not pass the title, though a portion of the purchase price is paid.

Chattel Mortgage: DESCRIPTION. A mortgage covering
 2 more or less, of corn in field" is not such a description as may be aided by extrinsic evidence; it is in fact no description.

Sale of Corn: WHEN TITLE PASSES. Where one pays for corn and
 3 it is set apart in the crib of the seller with nothing further to be done except for the seller to assist in hauling, the title thereto passes.

Appeal: SUFFICIENCY OF NOTICE. A notice of appeal which states
 4 "intervener in the above cause has appealed the same to the
 VOL. 120 IOWA.—26.

120	401
121	433
123	378

120	401
126	260

120	401
142	591
142	597

supreme court * * *'' is not open to the objection that it does not specify what is appealed from, even though there were practically two judgments where exception was taken to both.

Appeal from Mahaska District Court.—HON. A. R. DEWEY,
Judge.

FRIDAY, MAY 15, 1903.

ACTION in replevin for corn. James Winkleman intervened, claiming four hundred bushels under a chattel mortgage and by purchase. Defendant answered, denying plaintiff's title. Judgment as prayed, and intervener appeals.—*Reversed.*

J. F. & W. R. Lacey and *C. C. Orris* for appellant.

Seevers & Malcolm for appellee.

LADD, J.—In August, 1900, the plaintiff, Augustine, contracted with defendant, McDowell, for the purchase of one thousand bushels of corn. On the first six hundred bushels, \$25 was paid, and the following agreement duly signed: "Sold to A. J. Augustine one mile west of Rose Hill, Iowa, six hundred bushels of corn to be delivered in November, 1900, at A. J. Augustine's farm at twenty cents per bushel, 80 lbs. to the bushel." The contract for the four hundred bushels was the same, except that it was to be delivered in December, seventy-five pounds to the bushel, and \$30 was paid. McDowell raised about three thousand five hundred bushels of corn, and, after hauling two hundred and eighty-one bushels, refused to deliver the rest. But four hundred and ninety bushels remained on the premises when this suit was begun, and this was replevied by the plaintiff.

It will be noticed that the corn, when bought by Augustine, was standing in the field. None of it then or afterwards was set apart from that to be retained by Mc-

Dowell. There was nothing to show which corn had been bargained for. The contract was not a sale, but merely an agreement to sell. The advance of money to the defendant did not convert it into an executed contract. Says Mr. Benjamin in his work on Sales: "No case can be found in the books in which the giving of earnest has been held to pass the property in the subject-matter of the sale, where the completed bargain, if proved in writing or in any other sufficient manner, would not have equally altered the property." Two things remained to be done by the vendor—the corn to be separated from three thousand five hundred bushels owned by him, and thereafter delivered at the farm. In *Cook v. Logan*, 7 Iowa, 142, the court, in a very similar case, said: "The rule is that where some act remains to be done in relation to the articles which are the subject of the sale, as that of measuring or weighing, or, as in this case, that of separating and setting them apart from the bulk, so that they may be distinguished and identified, the performance of such an act is a prerequisite, and until it is performed the property does not pass to the vendee." This rule has been repeatedly approved since, and still obtains, unless it is made to appear that the parties intended title sooner to pass. *Welch v. Spies*, 103 Iowa, 889, and cases cited; *Snyder v. Tibbals*, 32 Iowa, 447; *Sneathen v. Grubbs*, 88 Pa. 147; *Morrison v. Dingley*, 63 Me. 553. The principle is elementary, and, when applied to the facts of this case, leads inevitably to the conclusion that plaintiff never acquired title to the corn not delivered. But McDowell has not appealed, and the adjudication against him is final.

Plaintiff, then, has a *prima facie* right of possession, and the burden of proof was upon intervener to establish his title. He claims four hundred bushels of the corn replevied under a chattel mortgage, and by virtue of a purchase from McDowell. This

a. SALE of
standing
corn: title.

a. CHATTEL
mortgage:
description.

mortgage was executed to him by McDowell August 17, 1900, to secure him as surety on a note of \$110 payable at a bank, on certain horses, and "seventy, more or less, of corn in field on the Ohas. F. Landers, farm, in section 7 Twp. 75 N., Range 14, Mahaska County, Iowa." As will be observed, it failed to state the quantity of corn pledged—whether seventy rows, bushels, shocks, or acres. This was not merely a defective description, as suggested by appellant, to be aided by extrinsic evidence, but no description at all. Oral evidence may be received as between the parties, or against a third party having notice, to apply the description in such an instrument, and thereby to identify and point out the particular property mortgaged, as has often been held, but not to insert the property intended to be, but not in fact, covered thereby. The facts of this case do not bring it within the rule of the majority in *Frick v. Fritz*, 115 Iowa, 433. In both the number is given, but in that the mortgage covered "yearlings and two year olds," but in this it covers nothing. In that the majority held oral evidence admissible to point out the kind of stock intended by the description; in this, the kind is indicated, but the mortgage is silent as to quantity. The distinction is manifest, and we unite in saying the mortgage did not constitute an incumbrance or lien on the corn.

The intervener further contends that about January 20, 1901, he entered into an oral agreement with McDowell, by the terms of which intervener was to pay the note to

3. SALE of corn:
when title
passes. the bank, and in consideration thereof, was to have four hundred bushels of corn; that in pursuance of this agreement he paid the note, and three hundred bushels in a certain crib and the granary were measured by him and McDowell, and declared to be intervener's corn, which McDowell was to help haul to Winkleman's place. It was farther understood that he was to have one hundred and twenty-five bushels from a pile of

snapped corn. Enough has already been said to dispose of the claim to the one hundred and twenty-five bushels. As to the three hundred bushels the evidence is undisputed, nothing remained to be done as between the parties to complete the sale, and we know of no reason why the intervenor should not have judgment for its value. The sheriff was informed that the corn belonged to Winkelman before the writ of replevin was served, so that there is no question of notice involved. Indeed, it may well be questioned whether plaintiff was in a situation to insist on notice, as he is not claiming as a creditor, and has failed to establish ownership. True, as contended, the intervenor, as supposed mortgagee, consented to the sale of one thousand bushels of McDowell's corn to plaintiff. But this did not preclude him from buying from the three thousand five hundred bushels owned by McDowell for himself. He bought as he had the perfect right to do, and acquired title by having it set apart to him before McDowell had parted with it to another. The court ought to have entered judgment in favor of the intervenor for the value of three hundred bushels of the corn taken under the writ.

II. Appellant's abstract set out the notice of appeal, which was duly served, and, after the title of the case, was in these words: "The intervenor in the above cause has

4. APPEAL:
sufficiency of
notice. appealed the same to the Supreme Court of Iowa, May term, 1902." Appellee prepared an additional abstract, without referring to this notice, and thereafter filed a motion to dismiss the appeal. In it the notice, as served, is set out, and, though more formal, is substantially the same. It may be repeated, except the title and names of attorneys, in so far as material: "You are hereby notified that intervenor in the above cause has appealed the same to the Supreme Court of the state of Iowa, and the same will come on for trial at the May term," etc. Counsel insist that this was insufficient, in that it failed to designate what is appealed from. Section

4114 of the Code provides that "An appeal is taken and perfected by the service of a notice in writing on the adverse party, his agent, or any attorney who appeared for him in the case in the court below, and also upon the clerk of the court wherein the proceedings were had, stating the appeal from the same, or from some specific part thereof, defining such part." It is true that there were practically two judgments below—one for the possession of the corn, and the other a dismissal of the petition of intervention. But the exception of intervener was to both of these, in so far as either affected his rights. His appeal, then, was from the entire proceeding, and this is all the statute seems to require shall be indicated in the notice. From an appeal of the cause, this is necessarily to be inferred. If the notice is as specific as exacted by statute, it is not open to the objection that it is a mere conclusion.—REVERSED.

HENRY BRANZ V. OMAHA & COUNCIL BLUFFS RAILWAY & BRIDGE COMPANY, Appellant.

Personal Injury: ASSUMPTION OF RISK. An ordinary laborer on an

- 1 electric railway, who never had occasion to make a car coupling or reason to suppose that he would be required to do so, does not assume the risk of defects in a car or drawhead of which he had no knowledge, when directed by his superior to make a coupling.

Contributory Negligence. In an action for injuries received while

- 2 coupling cars, where there is a conflict in the evidence as to whether plaintiff made the coupling in the usual and safe method, an issue of fact arises for the jury to determine.

Appeal from Pottawattamie District Court.—HON. A. B. THORNELL, Judge.

FRIDAY, MAY 15, 1903.

ACTION to recover damages for personal injuries received by plaintiff while in the employ of defendant. Verdict for plaintiff, and from judgment thereon defendant appeals.—*Affirmed.*

120 406
127 24
120 406
128 487
120 406
132 740

Wright & Baldwin for appellant.

F. W. Miller for appellee.

McCLAIN, J.—Plaintiff was injured while coupling an electric motor car to a flat car. The employe in charge of the motor car, which was standing separated a short distance from the flat car to which it was to be coupled, started the motor car back towards the flat car with a sudden jerk after the plaintiff, who was trying to make the coupling, had stepped between the cars for the purpose. The momentum of the motor car was such that, although plaintiff successfully made the coupling, the cars came so close together before he could retreat that he was injured.

No complaint is made of rulings on the introduction of testimony, nor as to the rules of law stated in the instructions to the jury, but counsel for appellant urge that there was no evidence to support the allegations of negligence, and that without conflict in the evidence it appeared that plaintiff was guilty of contributory negligence. They contend that the case should not have been submitted, at least as to some of the allegations of negligence, and that after the verdict was returned for plaintiff, it should have been set aside on motion for new trial as without support. The negligence alleged was in using a defective motor car, which would not start at all until sufficient power was applied to make it start quickly and with a jump, the claim of plaintiff being that the coupling of the motor car to the flat car was rendered peculiarly hazardous by reason of this fact; also that the drawhead attached to the motor car, by means of which it was to be coupled to the flat car, was defective by reason of a break on one side in the surrounding collar, so that, when the coupling was made, the drawbars, instead of forming a stiff connection, preventing the motor from coming so near to the flat car as to injure plaintiff standing between them, gave way towards

the plaintiff, and allowed the motor and car to come so closely together as to crush him. There was evidence tending to support each of these allegations. Witnesses testified that the motor car was out of order in the respect alleged, and had been in bad condition in this respect for some time before the accident, and while a witness for the defendant, who himself said that the car was in bad condition on the morning preceding the accident, testified that he had put it in good condition, his testimony was so far in conflict with that of the other witnesses as to what he did that the jury may well have found that the bad condition of the car was not remedied. As to the defective drawhead, the question whether the defect had any connection with the accident seemed to depend, under the evidence, on whether a gooseneck link was used in making the coupling. There is certainly some evidence tending to show the use of such link, and that, if that kind of a link was used, the defect in the drawhead would lead to just the kind of accident which happened. The defect in the drawhead was shown to have existed for such length of time that defendant ought to have been aware thereof; and, indeed, it appears that its employe whose duty it was to keep the cars in order was aware of it, and allowed the car to be used without remedying the defect.

It is argued for appellant that plaintiff assumed the risk of the defective car and the defective drawhead. But plaintiff was not engaged especially in the business of coupling cars. He was an ordinary laborer, working with other laborers of the same character. He had never before had occasion to make a coupling, nor had he any reason to suppose that he would be required to do so. In this particular instance he was asked by the foreman to make the coupling because he was nearer to the place where it was to be made than any of the other employes. He had no reason to know of defects in the car or the drawhead which were of any import-

1. ASSUMPTION
of risk.

ance to him in his employment, and it does not appear that he had ever observed either of them. At the very time the coupling was made he had not a chance to know, before the danger arose, either that the motor was defective or that the drawhead was broken. Certainly, under these circumstances, there could be no assumption of risk.

As to the contributory negligence of plaintiff, there is evidence tending to show that he attempted to make the coupling in a reasonably safe manner, and in the manner

2. CONTRIBUTORY NEGLIGENCE. in which such couplings were usually made.

A witness for defendant testified that the coupling might have been made by plaintiff without going between the cars, and that such was the proper method. But there is evidence to the contrary as to the usual and safe method of making such couplings, and the question was for the jury. The same witness for defendant further testified that a proper method of making such coupling was to wait until the motor and flat car were near enough together to enable the coupling to be made and the motor had come to a stop. But here again the testimony was not at all conclusive. While counsel for defendant attempted to show that plaintiff had been instructed as to the proper method of making such coupling, and had been warned against the method which he employed, it is by no means shown beyond controversy that any such instruction or warning ever reached plaintiff. As above suggested, the making of couplings was not a part of his ordinary employment, and he had no occasion to seek instruction, as he had no reason to expect that he would be called upon to render such service.

After a careful reading of the entire record, we are satisfied that there was evidence tending to sustain the contention of plaintiff under the issues on which the case was submitted, and that there was no error in refusing to grant a new trial.—AFFIRMED.

MARGARET P. ROBERTSON, Appellant, v. J. J. HARTENBOWER,
Mayor of Des Moines, *et al.*

Condemnation Proceedings: ABANDONMENT. A condemnation of private property by a city may be abandoned where the same is in good faith and includes the entire proceedings, but if there is not such a good faith abandonment the finding of the sheriff's jury or of the trial jury on appeal constitutes an adjudication binding upon the condemnor.

Appeal from Polk District Court.—HON. S. F. PROUTY,
Judge.

FRIDAY, MAY 15, 1903.

IN September, 1899, the city council of Des Moines commenced condemnation proceedings to acquire property of the plaintiff for street extension purposes, as follows: The north thirty-three feet of lot four, the south six feet of lot nine, and a strip of ground in lot four, fifty feet wide by seventy-two feet long. Commissioners were duly appointed by the sheriff, and the plaintiff was awarded \$4,000 for the north thirty-three feet of lot four, \$200 for the south six feet of lot nine, and \$300 for the strip fifty feet wide by seventy-two feet long in lot four; making a total award of \$4,500. The award was satisfactory to the plaintiff, but was never accepted or paid by the defendant, nor did the defendant take possession of the land. In November of the same year the defendant ordered the same land in lot four condemned, and the south seven feet of lot nine instead of the six feet, as before. New commissioners were appointed, and the following award made: \$2,500 for the north thirty-three feet of lot four, \$225 for the south seven feet of lot nine, and \$475 for the strip seventy-two feet long in lot four; making a total award

of \$3,250. This was also satisfactory to the plaintiff, but was appealed from by the defendant, and the appeal dismissed in April, 1900. In March, 1901, the city ordered another condemnation of the plaintiff's land. This time it wanted the north forty-three feet of lot four, and the other land last above described. Commissioners were again appointed, and a new award made, as follows: For the north forty-three feet and the south seven feet of lot four \$2,490, and for the other strip \$200; making the total award \$2,690. The amount of the last award was deposited with the sheriff by the defendant, and the plaintiff commenced *certiorari* proceedings to test the validity of the defendant's action. Her petition was dismissed, and she appeals.—*Reversed*.

Macomber & Tankersley and *E. T. Morris* for appellant.

W. H. Bremner, M. H. Cohen and *Raymond B. Albersson* for appellees.

SHERWIN, J.—But two questions are before us for consideration: First, did the city have the power to order the second and third condemnations of the same land for the same purpose? and, second, will a writ of *certiorari* lie to determine that question? The power given to cities and towns to condemn private property for public use is conferred by section 880 of the Code. Section 884 provides that the proceedings therefor "shall be in accordance with the provisions relating to taking private property for works of internal improvement, except that the jurors shall have the additional qualification of being freeholders of the city or town." The taking of private property for works of internal improvement is governed by title 10, chapter 4, Code, and the procedure therein required, so far as applicable to this case, is designated in sections 1999, 2000, 2008-2011, inclusive. The latter section pro-

vides for the trial of an appeal from the jury's award, and says: "Should the corporation decline to take the property and pay the damages awarded on final determination of the appeal, then it shall pay in addition to the costs and damages actually suffered by the landowner, reasonable attorney's fees to be taxed by the court." The appellees contend that under this section the defendants had the right to and did abandon the first two condemnations, and declined to take the property and pay the damages awarded. That this statute provides for the abandonment of the condemnation proceedings we do not doubt, and it may be conceded to be the rule in this and many of the other states that such proceeding may be abandoned even after an award by the sheriff's jury or upon an appeal. *Gear v. The Dubuque & Sioux City R. R. Co.*, 20 Iowa, 523; *Nelson v. Goodykoontz*, 47 Iowa, 32; 2 Lewis on Eminent Domain, section 656, and authorities cited in note thirteen.

But the abandonment contemplated by the statute, and by the authorities which we have been able to examine, is an abandonment in good faith of the entire proceedings and of the land for the purpose for which it was sought. In other words, it must be a complete surrender of the project so far as the land involved is concerned. The law permitting the taking of private property for public use is arbitrary in its nature, and should always be strictly construed to protect the rights of the landowner whose land may be thus taken, whether he so wills or not. The right of abandonment implied by this statute does not in our judgment, give the condemnor the power to abandon the award alone, or the power to abandon the entire proceeding simply for the purpose of securing another jury whose finding may be more favorable to him. If he were permitted to do this, he would be given an unfair advantage over the landowner never contemplated by the statute, and one which the courts will never sanction. If there

be not such a good-faith abandonment as we have designated, it is clear that the finding of the sheriff's jury where there is no appeal, or by the trial jury in case of an appeal, is an adjudication binding upon the condemnor. *Hupert v. Anderson et al*, 85 Iowa, 578; *State v. City of Keokuk*, 9 Iowa, 489; *Chicago, R. I. & P. R. Co. v. City of Chicago*, 148 Ill. 479 (32 N. E. Rep. 178); *Chicago, R. I. & P. R. R. Co. v. City of Chicago* 148 Ill. 479 (36 N. E. Rep. 72); *Illinois Central R. Co. v. City of Champaign*, 163 Ill. 524 (45 N. E. Rep. 120); *Rogers v. City of St. Charles*, 3 Mo. App. 41.

It is manifest that the defendant's so-called abandonment was not in good faith, and that it was for no other purpose than to straightway commence the same proceedings again, with the hope of securing a more favorable award. It is said, however, that *Corbin v. The Cedar Rapids Ry. Co.*, 66 Iowa, 73, sustains the action of the city council, and it must be confessed that some of the language of the opinion tends in that direction, but the facts in that case were entirely different from those before us. There the defendant conclusively proved a good-faith abandonment of the condemnation proceeding for two reasons: First, because it thought it had not proceeded legally; and, second, because its lessor had a contract for the purchase of the land, which it sought to enforce, but failed in so doing. Furthermore, the defendant was not dissatisfied with the amount of the award, but tendered it to the plaintiff in the second condemnation proceedings.

That *certiorari* will lie to determine the legality of the defendant's action has been held in *Hupert v. Anderson*, *supra*, and in *Rockwell v. Bowers*, 88 Iowa, 88.

The assignment of error we deem sufficient. The judgment is REVERSED.

FRANK SHEBECK, Administrator of the Estate of William Shebeck, Deceased, Appellant, v. THE NATIONAL CRACKER COMPANY, Appellee.

Master and Servant: ASSUMPTION OF RISK: BURDEN OF PROOF:

- 1 INSTRUCTION. In an action for injuries resulting in the death of a servant, owing to alleged defective machinery and negligence of the master to keep it in repair, where the answer alleges that the defective condition of the machinery was known to deceased and that he remained in defendant's employ without objection, the issue of assumption of risk is tendered with the burden upon the defendant, and a general instruction that under the issues the burden is on the plaintiff is erroneous.

Liability of Master: INSTRUCTION: In an action for damages for

- 2 the death of an employe engaged in operating machinery, an instruction that "if you find from the evidence that the nut at the end of the shaft in question was in the habit of coming off, or that it was off for hours at a time, or that by reason of such defect the wheel came out, the defendant was guilty of negligence" is misleading and states the rule of the master's liability in the case too narrowly.

Assumption of Risk: AGE AND EXPERIENCE: INSTRUCTION. On an

- 3 issue of the assumption of risk, age and experience of the servant should be considered in determining whether he knew or ought to have known and appreciated the danger, and failure to instruct upon this branch of the case was error.

Stating Issues. The court should so far as possible state the issues

- 4 in an abbreviated form rather than by substantially setting out the pleadings, as there is less liability to confusion.

Practice: OBJECTION TO THE RECORD: MOTION TO STRIKE. Objec-

- 5 tions to the record or the manner in which it has been preserved must be specifically pointed out or the objection is waived, and a motion to strike will not lie.

Appeal from Cedar Rapids Superior Court.--HON. T. M. GILBERSON, Judge.

SATURDAY, MAY 16, 1903.

ACTION at law to recover damages for personal injuries occasioned by defendant's negligence. Verdict and judgment for defendant, and plaintiff appeals.—*Reversed.*

Rickel, Crocker & Tourtellot for appellant.

Jamison & Smyth for appellee.

WEAVER, J.—It is alleged that William Shebeck, an inexperienced boy of eighteen years, was employed by defendant in its cracker factory, and set to work feeding dough through the rollers of a machine there in use; and while thus employed he was, without fault on his own part, caught in the gearing of said machine, receiving injuries from which death ensued. The defendant is charged with negligence in failing to instruct and warn the deceased concerning the dangers attending the use of said machines; in failing to properly box or otherwise guard the wheels and gearing, which were operated at very great speed and were out of repair, thus increasing the danger to those working near them; and in neglecting to provide a safe place for said employe to work. Damages are asked for the loss to the estate of the deceased; also for the loss of his services to his father, who has assigned his claim therefor to the plaintiff. The defendant denies the petition; says the dangers of the employment, if any, and the defects, if any, in the machinery, were open and visible, and the risk thereof was assumed by the deceased. There was evidence tending to show that deceased was young and inexperienced; that to perform the work to which he was assigned he was required to stand between two uncovered wheels revolving at considerable speed; that the machinery was worn and out of repair, by reason of which a nut and pin holding one of the wheels upon its shaft would become loose, and the pin would protrude from the end of the shaft; that when in this condition the clothing of the

attendant was liable to be caught and wound upon the shaft; that such was the condition of the machine at the time of the accident, and such the manner in which said employe received his injuries. It is also shown, or the jury would have been justified in finding, that this defective condition of the machinery had existed, to the knowledge of the defendant, for a long time prior to the employment of deceased. It was no part of the young man's duty to manage or repair the machinery, such service being performed by an engineer employed for that purpose. It also appears that the gearing of the machine was adjustable to different rates of speed for different grades of work, and that on the day of the accident a change had been made by which the motion was accelerated. The errors assigned are based largely upon the charge of the court to the jury, and upon the refusal to give instructions asked by the plaintiff.

L. By the second paragraph of the charge the jury were told that the burden of proof under the issues was upon plaintiff, and by the fifth paragraph they were further

1. ASSUMPTION
of risk: bur-
den of proof:
instructions.

told that if the deceased, while employed by defendant, knew the defective condition of the machine, or could have known it by the exercise of ordinary care, and continued to work there without protest or promise of the defendant to make repairs, then there could be no recovery of damages. These instructions are erroneous. True, the burden was upon plaintiff to establish the alleged negligence of defendant, the consequent injury of the deceased, and his freedom from contributory negligence, but the pleadings, as we have seen, presented another issue. The answer alleged that the defective condition of the machinery was well known to the deceased, and that, knowing it, he remained in defendant's service without protest. In other words, the answer tenders a plea of assumption of risk, and upon this issue the jury should have been told the burden was

on defendant. *Nicholaus v. R. R.*, 90 Iowa, 85; *Thompson v. Railroad Co.*, 70 Minn. 219 (72 N. W. Rep. 962); *Nadau v. White R. L. Co.*, 76 Wis. 120 (43 N. W. Rep. 1185, 20 Am. St. Rep. 29). The effect of the court's charge was to reverse this rule, and cast the burden upon the plaintiff, and we cannot say the error was without prejudice.

II. The fourth paragraph of the charge is in the following words: "You are instructed that if you find from the evidence that the nut on the end of the shaft in question was in the habit of coming off, or that it was off for hours at a time, or that by reason of such defect the wheel came out, the defendant was guilty of negligence." The same language is, in substance, repeated in another paragraph. We think the jury would have been justified in drawing the conclusion from this instruction that defendant could not be held chargeable with negligence unless it was first found that the "wheel was in the habit of coming off, or that it was off for hours at a time." It is very probable the court did not mean to be so understood, but the language employed is fairly capable of such construction, and had a clear tendency to mislead the jury. Certainly, the negligence of defendant is not to be made dependent upon the fact that the nut worked loose so often that the condition may be called "habitual," or upon its being allowed to continue in that condition for "hours." It was defendant's duty not only to provide its employes a reasonably safe place to work, but to use reasonable care and prudence in providing machinery and appliances safe and suitable for his use. This duty involves not only the furnishing of safe machinery, but watchfulness to keep it in safe repair. *Brann v. R. R.*, 58 Iowa, 595; *Knapp v. R. R.*, 71 Iowa, 41; *Rogers v. Ludlow*, 144 Mass. 198 (11 N. E. Rep. 77, 59 Am. Rep. 68); *Ford v. R. R.*, 110 Mass. 240 (14 Am. Rep. 598). See, Vol. 120 Iowa.—27.

also, Wharton's Negligence, sections 212, 282. In other words, the master is to be held responsible not alone for defects of which he has actual knowledge, but for those, as well, which the exercise of reasonable care and diligence on his part would have brought to his notice. This is to be considered, of course, in connection with the other rule, which holds the employe to assume the risk of all dangers which naturally or ordinarily pertain to the employment upon which he enters, as well as those dangers which are open and obvious to his senses as a person of ordinary intelligence and care. He is not required to inspect or search for obscure dangers or defects in his place of work, or in the machinery or appliances furnished him. He may rely upon the master having performed the duties which attach to that relation, save only as to such matters as are open to his observation, or such as, in the ordinary discharge of his employment, we may fairly say ought to have come to his knowledge. We hold, therefore, that the fourth paragraph of the charge states the rule of the master's liability in this case much too narrowly, and should not have been given.

III. The court's charge, as a whole, is open to the objection made that it wholly ignores one very material feature of the plaintiff's claim. It is charged, and the evidence tends to show, that the deceased was about eighteen years of age; that he entered defendant's employment only a few days before his injury, having no experience in that kind of work. There is nothing tending to show whether he did or did not receive any instructions or warnings as to the dangers of his position, and it was proper, therefore, not to submit to the jury the allegation of negligence based on defendant's failure in this respect; but the fact of the youth and inexperience of the deceased remained an important element for the consideration of the jury, and especially with reference to the question of contributory negligence and

3. ASSUMPTION
of risk: age
and exper-
ience: in-
struction.

assumption of risk. The degree of care he was bound to exercise to absolve himself from contributory negligence is such care as might reasonably be expected from one of his age and experience under like circumstances and surroundings. So, also, even though he knew the machine to be defective, yet, in order to impute to him either contributory negligence or assumption of risk, the jury must further find that he knew, or as a reasonably prudent person under the same circumstances he ought to have known, that such defect was a source of danger. *Stomme v. Produce Co.*, 108 Iowa, 140; *Sullivan v. R. R. Co.*, 107 Mo. 66 (17 S. W. Rep. 748, 28 Am. St. Rep. 388); *Wuotilla v. Duluth*, 37 Minn. 153 (33 N. W. Rep. 551, 5 Am. St. Rep. 832); 20 A. & E. Ency. Law (2d Ed.) 122. It is obvious, therefore, that the age and experience of the person are not to be overlooked in determining whether he knew or ought to have known and appreciated the peril, and these are material inquiries in considering the issue of assumption of risk. *Jones v. Florence M. Co.*, 66 Wis. 268 (28 N. W. Rep. 207, 57 Am. Rep. 269); *Dowling v. Allen*, 74 Mo. 13 (41 Am. Rep. 298); *Parkhurst v. Johnson*, 50 Mich. 70 (15 N. W. Rep. 107, 45 Am. Rep. 28). The appellant asked the court to instruct the jury upon the law in this respect, and in failing so to do there was error.

IV. The court, instead of stating the issues to the jury in abbreviated form, set out substantially the entire petition and answer. We realize the difficulty which trial courts often find in endeavoring to condense the issues into a brief statement without giving ground for complaint that some essential proposition has been omitted. But danger of confusing the jury by a too extended and literal recitation of all the matters with which counsel frequently burden their pleadings is to be discouraged and avoided, and we think the issues here could have been rendered much clearer by abbreviation of the statement; *Swanson v. Allen*, 108 Iowa, 419; *Robin-*

4. STATING
ISSUES.

son v. Berkey, 100 Iowa, 136. We should not be inclined to reverse upon this ground alone in the present case, but call attention to the rule in order that the objection may be obviated on a retrial. Other errors are assigned, but the questions involved are not likely to arise upon another trial, and we will not take the time to discuss them.

V. Appellee has moved to strike from appellant's abstract so much thereof as purports to set out the evidence in the case, and to dismiss the appeal because it is not shown that such evidence was preserved and made of record by a bill of exceptions. The motion cannot prevail.

5. PRACTICE:
objection to
the record:
motion to
strike.

Appellee, by way of preface to its argument, filed an additional or amended abstract of the evidence, and while therein complaining that appellants abstract was not a full and fair statement of the record, no where denies or puts in issue the preservation of the record by a proper bill of exceptions. Under the repeated holdings of this court, we are bound under such circumstances to treat the abstract and amendment as containing all the evidence which the parties deem material to the questions raised by the appeal. General denials will not avail. They must point out especially the alleged defect. Supreme Court rule 22. If any questions are to be argued as to the sufficiency of the steps by which the record has been preserved, the issue must be raised by specific denial; otherwise, the objection is waived, and a motion to strike will not lie. *Kirkman v. Coal Co.*, 112 Iowa, 668; *McGillivray v. Case*, 107 Iowa, 17; *Palmer v. Clark*, 114 Iowa, 558; Code, 1897, section 4118. Appellee, though having the opportunity in its amended abstract, tendered no such issue, and, under the well-settled rule of practice in this court, we cannot now consider it, and the motion is denied.

For the reasons hereinbefore stated, the judgment appealed from is REVERSED.

IN RE ESTATE OF WM. CUMMINGS, SR., Deceased.

Wills: EXECUTOR'S REPORT: OBJECTION TO: ESTOPPEL. The fact

- 1 that a legatee under a will who is a nonresident of the state employs attorneys to represent her, who advise the executor to make a certain charge against her, will not estop such legatee from resisting such charge on learning the facts and before final settlement of the estate, where it appears that such attorneys without her knowledge were also attorneys for the executor.

Wills: CONSTRUCTION: ADVANCEMENTS: INDEBTEDNESS OF HEIR.

- 2 Where a testator bequeaths to his children an equal share but directs that from the share of one a certain sum shall be deducted for advancements, the same includes all indebtedness due the estate from such heir at the time of the execution of the will.

Agreement to Accept Less Than Bequest: VALIDITY OF. An

- 3 agreement of a legatee made during minority that the amount of a note due from her to the estate shall be deducted from her bequest is void, because of her minority and also for want of consideration.

Reopening Case: EVIDENCE. Refusal to reopen a case after decree

- 4 to permit further testimony will not be interfered with where there is no abuse of discretion. Showing in this case held insufficient to sustain the motion.

Appeal from Mahaska District Court.—HON. JOHN T. SCOTT, Judge.

SATURDAY, MAY 16, 1903.

APPEAL from an order entered in probate. Wm. Cummings, Sr., died testate, and his will was duly admitted to probate. By the terms of such will, he directed the payment of certain specific legacies, and then directed a division of the remainder of his estate among all his children, share and share alike, including one share to the heirs of his deceased daughter, Della Moore. "It being

my desire that each of my said children, or their heirs, shall have an equal full share, save and except, * * * that my daughter, Della Moore, is dead and left one child, and that I advanced to her mother in her lifetime the sum of \$400, which I direct shall be deducted from the share of the heirs of Della Moore in my estate * * * and I hereby direct my executors to distribute my estate as above directed—first to pay * * * [specific legacies] then divide the remainder into nine equal shares among said heirs, deducting * * * from the share of the said heir of Della Moore \$400." A final report, so called, was filed by the executors, in which there appears charged as against the share of Maud Magee, the daughter and only child of Della Moore, deceased, the sum of \$400; also the sum of \$865, the latter said to be on account of a note given by Della Moore to her father in his lifetime. To that part of the report charging her the sum last above named, said Maud Magee filed exceptions. On her motion the matter was transferred to the equity docket, and there heard as an equitable action. There was a decree sustaining the exception to the report, and the executors appeal. —*Affirmed.*

Bolton, McCoy & Bolton for appellants.

John F. & W. R. Lacey for appellees.

BISHOP, C. J.—Appellants have assigned errors, and we may dispose of the case by taking note simply of the questions thus raised.

L. At the beginning of the trial, the executors moved the court to strike from the files the exceptions filed by Maude Magee, and this for the reason that the final report, so called, was filed March 20, 1899; that on that day notice of such report was ordered published one week, and that such notice was published, fixing March 28, 1899 as, the time for final hearing, at which exceptions might be

heard; that on said day the court approved the report, the order being as follows: "Now on this day this cause came on for hearing on final report, and the court, having examined said report, approves the same, and orders distribution;" that the exceptions now being insisted upon were filed too late. It appears that the exceptions were filed February 17, 1900, and thereafter amendments were made thereto. The motion was overruled, and an exception was saved by the executors. It is recited in the appellants' abstract that thereupon "former adjudication and estoppel, based upon the evidence as hereinafter set out, was pleaded by the executors." No farther information is afforded us by the abstract upon the subject of the issues thus tendered. In an additional abstract filed on behalf of appellee, we find a pleading which we assume was intended to have application to the pleading thus filed by the executors. Therein are found allegations of fact evidently addressed to a plea of former adjudication and of estoppel. Taking into consideration the confusion existing, we think it proper to consider the entire record, and therefrom determine generally whether appellee's exception should have been heard, in view of her previous conduct, and what had been done in the matter of the estate prior to the filing thereof.

First, as to the facts: The matter of the estate is pending in Mahaska county. The appellee at all the times in question has resided in the state of Colorado. She had knowledge of the provisions of the will, but she had no personal knowledge of the filing of the report, or the order of court based thereon. Bolton, McCoy & Bolton, at Oskaloosa, were acting as her attorneys, with her approval. It appears that they were also acting for the executors, and presumably the report in question was prepared under their supervision. Certain it is that they advised making the charge of \$365 against appellee. Appellee was not advised of the inten-

1. EXECUTOR'S
report: ob-
jection to:
estoppel.

tion to make such charge against her until some time after the order was made approving the report. Upon being advised, she at once took steps, through other attorneys, to have the error corrected, and this resulted in the filing of the exceptions now under consideration. Turning for a moment to the report, while the same is denominated a "final report," it is evident that it cannot be considered as such. Therein is reported a certain amount of money on hand, and an order for distribution is asked. The executors do not ask to be discharged, and the order made goes no farther than to order distribution. In addition to this, it appears that all matters connected with the estate had not yet been settled at the time these exceptions were filed. It is true that distribution of the moneys reported on hand has been made, but it is admitted that other moneys have come into the hands of the executors, sufficient in amount to pay appellee the amount claimed by her, if she is found entitled thereto, and make a further distribution. We have, then, an estate not fully settled; and in connection therewith we have a complaint that, in respect of a report filed, a mistake has been made in determining the amount due the several heirs. Section 3398 of the Code provides as follows: "Mistakes in settlement may be corrected in the probate court at any time before his [the executor's] final settlement and discharge; and after that time by equitable proceedings on showing such grounds that will justify the interference of a court." It will not do to say that the appellee is estopped by reason of the fact that the mistake occurred through the advice or with the consent of the attorneys whom she had employed. They were acting also for the executor, and this without her knowledge, as far as disclosed by the record. In respect of the particular matter in controversy, they were acting wholly in the interest of the executors and against the interest of the appellee. No principle of equity can be found upon which to justify a holding that

she became bound thereby. It is not suggested that any wrongdoing was intended by the attorneys, and the record discloses no such intention on their part. It is to be said simply that the circumstances were such that they could not serve the interests of both parties, and we hold that appellee is not bound by the conclusion at which they arrived. It follows from what we have said that the motion was properly overruled, and that the plea of former adjudication and estoppel is without support in the record.

II. We are now brought to a consideration of the second ground of contention presented by appellants. Was there a mistake made in charging to the share of appellee

2. WILLS: construction: advancement: indebtedness of heir.

the sum of \$365? The date of the execution of the will is not disclosed by the abstract. December 14, 1896, is given as the date in the argument of counsel for appellee, and as this is not disputed the statement may be accepted as correct. At the time of the execution thereof, the testator held the note of his daughter Della Moore, dated December 1, 1888, for \$300, payable one day after date, with interest at eight per cent. per annum, payable annually; overdue interest to draw interest at eight per cent. per annum, payable annually. On the back of said note is an indorsement, without date, "Received on within note \$175." That such was the only evidence of indebtedness held against Della Moore is conceded as a fact in the case. The theory upon which the executors proceeded in making their report and distribution thereunder was that out of the share of appellee should be deducted the sum of \$400, by force of the provision in the will; that the note above referred to, being evidence of a specific item of indebtedness held against Della Moore, should also be deducted. The trial court held that this was error, and, without difficulty, we agree that such holding was correct. The note was the only evidence of indebtedness produced, and, although the amount due on such note varies somewhat from the

amount named in the will, it may be presumed that such indebtedness was in the mind of the testator when the will was executed. But whether this be so or not, it is certain that the testator fixed upon \$400 as the sum total to be deducted from the share to be paid appellee. There is no ambiguity in the terms of the will. But one conclusion is to be drawn from the reading thereof. It follows that, whatever may have been the indebtedness due from the daughter at the time of the execution of the will, the father chose to limit it to the sum named; and it does not remain for the courts even to sit in judgment upon his clearly expressed desire, except to carry the same into effect. From the use of the word "advanced" in the will, it is suggested in argument that the sum named, has reference to moneys given the daughter by way of advancement, as distinguished from moneys loaned and therefore the amount of the note was neither intended to be included in the sum named, nor was the debt represented thereby intended to be forgiven. This position is untenable. In the first place, it is based altogether upon speculation; and, next, it is in direct opposition to the plain and controlling provision of the will, "then divide the remainder into nine equal shares among said heirs, deducting * * * from the share of the said heir of Della Moore \$400." So, too, advancements made by a testator prior to the execution of his will, even though designated as such at the time made, are taken to be gifts, pure and simple, and cannot be considered in the settlement of the estate under the will unless such instrument so directs in specific terms. *Estate of Lyon*, 70 Iowa, 375; *McCormick v. Hanks*, 105 Iowa, 639.

III. There is no merit in the contention of counsel for appellants wherein the claim is made that at a meeting of the various heirs, including appellee, held at Oskaloosa soon after the death of the testator, she (said appellee) consented that the particular item of indebtedness which is the subject of

3. AGREEMENT
to accept
less than
bequest;
validity of.

this controversy should be deducted from her share, in addition to the sum mentioned in the will. It is sufficient to say, without setting forth the testimony of the witnesses, that the evidence, as a whole, fails to satisfy us that any such agreement was made. Be the fact in that respect as it may, the alleged agreement could not be enforced for at least two reasons, either one of which is conclusive: In the first place, appellee was under no legal or moral obligation to accept less than the will gave her, and such agreement, if made, was without consideration; second, at the time the agreement is said to have been made, appellee was a minor and incapable of entering into a valid contract. It is a further contention of appellants that in letters written by appellee to her attorneys named, and which are produced by them and introduced in evidence, she agreed to the deduction of the amount of the note in question from her share, in addition to the deduction directed by the will. We have read the letters carefully, and, to our minds, they are not open to any such construction.

IV. After the decree had been signed and entered by the court below, appellants moved to set the same aside, and permit the introduction by them of further evidence to the effect that, within their knowledge, the testator, during his lifetime, had made advancements to Della Moore other than as represented by the note in question. It does not appear from the showing made whether the advancements sought to be proven were made before or after the will was executed. Nor does it appear what were the circumstances of the making thereof—whether gift or loan, and, if the latter, what, if any, conditions were attached thereto, or what, if any, evidence was preserved thereof. This motion was overruled, and we think the ruling involved no abuse of discretion. *Tisdale v. Conn. Mut. L. Ins. Co.* 28 Iowa, 12; *Byington v. Moore*, 62 Iowa, 470.

We conclude that the decree of the court below was warranted in all respects, and it is **AFFIRMED**.

4. REOPENING
case: evi-
dence.

THOMAS R. POWERS, Appellant, v. WM. BENSON, *et al.*

Replevin: RIGHT TO POSSESSION: PROOF. Where the plaintiff in a
1 replevin action bases his right to possession on ownership, a
previously executed mortgage on part of the property is inad-
missible to establish right of possession.

Assignment of Error. An assignment of error that "the court erred
2 in giving the instructions," naming them, "and each of them",
is too indefinite for consideration.

Evidence. There is no prejudicial error in sustaining objections
3 to questions which are afterwards substantially answered by
the witness.

Bill of Sale: MORTGAGE. A bill of sale cannot be shown to be in
4 fact a mortgage except upon clear and satisfactory proof.

Damages for Detention: MONEY JUDGMENT. In a replevin action
5 where one elects to treat the property as converted at the time
it was taken and have a money judgment for its value at that
time, he is not entitled to damages for detention.

Money Judgment: WAIVER: TITLE. In a replevin action, an
6 election to take a money judgment for the value of the prop-
erty is a waiver of its return, and vests title in the party
holding the same as of the time it was taken.

Appeal from Buchanan District Court.—HON. FRANKLIN
C. PLATT, Judge.

SATURDAY, MAY 16, 1903.

ACTION to recover the possession of specific personal
property. Trial to a jury, and verdict and judgment for
the defendants. The plaintiff appeals.—*Reversed.*

Helman and French for appellant.

E. E. Hasner for appellees.

SHERWIN, J.—The plaintiff alleges that he became the
owner of the property in question by purchase from one

120	428
125	577
126	600
120	428
127	229
120	428
136	588
120	428
137	306

of the defendants, and that said defendant duly executed and delivered to him a bill of sale of the same. His right to the possession of the property was based solely upon this claim of absolute ownership. The offer of a previously executed chattel mortgage which it was claimed covered a part of the same property, for the purpose of proving his right to possession, was rightly rejected. *Kern & Son v. Wilson*, 73 Iowa, 490.

Complaint is made of certain instructions given by the trial court, but the appellee challenges the sufficiency of the assignment of error relating thereto. It is as follows: "The court erred in giving the instruction," naming them, "and each of them." Such an assignment is too indefinite and uncertain. *Fitch v. Mason City & Clear Lake Traction Co.*, 116 Iowa, 716; *Huss v. Railroad*, 113 Iowa, 348; *Copeland v. Ferris*, 118 Iowa, 554.

There was no prejudicial error in sustaining the objections to questions asked the defendant Benson on cross-examination, on the ground that they were leading. The objections were not good, but the inquiries related to unimportant matters, and were substantially answered by the witness at other times.

The assignment of error as to the sufficiency of the evidence and as to the legality of the judgment entered is good, and we will now consider those matters. We have read and re-read the testimony of the defendant William Benson, the maker of the bill of sale, and reach the conclusion that his testimony as to the transaction wholly fails to prove that it was his intent to then execute a mortgage only; and when his testimony is read and considered in connection with that of McHugh, and in connection with the circumstances and transactions leading up to the execution of the bill of sale, we think it is demonstrated to a certainty almost that he intended

1. RIGHT to possession: proof. and delivered to him a bill of sale of the same. His right to the possession of the

2: ASSIGNMENT of error. lows: "The court erred in giving the instruction," naming them, "and each of them."

3. EVIDENCE. related to unimportant matters, and were substantially answered by the witness at other times.

4. BILL of sale: mortgage. ant William Benson, the maker of the bill

to give a bill of sale conveying an absolute title to the property. Certain it is that the instrument is an absolute bill of sale in form, and that it has not been altered in any material part since he executed it, and it is a well-settled rule that a written instrument, duly executed, cannot be impeached and shown to be other than it purports to be except upon clear and satisfactory evidence.

The verdict should have been set aside, so far as the property claimed by William Benson was concerned, for lack of evidence to support it. The property taken under the writ was delivered to the plaintiff. It consisted of horses and wagons, cows, pigs, etc. The jury found the value thereof, and that the defendants had suffered damages by reason of its detention.

After the verdict the defendants asked for money judgments against the plaintiff and his bond. Judgments were thereupon rendered against him for the full value of the property and for the damages found in favor of the defendants for its detention.

5. DAMAGES
for detention;
money judgment.

There is an apparent conflict in the decisions of this court as to the true measure of damages in cases of this kind. In *Cook v. Hamilton*, 67 Iowa, 394, it was held that a plaintiff in an action of replevin, who had not had the property delivered to him, might elect to take a money judgment, and with it the damages suffered by its detention. The *Cook Case* was cited with approval in *Turner v. Yunker*, 76 Iowa, 258, and in *McIntire v. Eastman*, 76 Iowa, 455. It was followed also in *Hartley State Bank v. McCorkell*, 91 Iowa, 660. In *Becker v. Staab*, 114 Iowa, 319, the facts were not precisely the same as those presented here, for there the damages sought were for time spent in preparing for the trial and for personal expenses connected therewith, while here recovery was had for the value of the use of the property. The principle involved, however, is the same in both cases; and we there held, without expressly

overruling former cases, that a recovery could not be had of damages for the detention of property when the party found to be entitled to its possession elected to take a money judgment for its value, and we there cited cases holding such to be the better rule. A person whose property has been wrongfully taken and detained is entitled to full compensation for his injury and nothing more. Different conditions may, however, vary the amount which will represent such compensation. In case of property which is of special value for its use, damages for its detention may be recovered when interest on the value thereof from the time when taken to the time of the trial would not make good the injury suffered. But it is manifest that where the injured party elects to treat the property as converted at the time it was taken from him, and to recover its value at that time, he should not be permitted to recover damages for its detention thereafter. Wells on Replevin, sections 223, 580; Sutherland on Damages, 539; *Hanselman v. Kegel*, 60 Mich., 540 (27 N. W. Rep. 678); *Just v. Porter*, 64 Mich. 565 (31 N. W. Rep. 444).

It is difficult to establish a rule which shall apply to all cases, without regard to their peculiar facts, and we are not attempting to do so here. In this case the value of the property at the time it was taken from the defendants on the writ was proven, and the subsequent election to take a money judgment for its value was a waiver of its return, and vested the title in the plaintiff as of the time it was taken. *Bacon v. Kimmel*, 14 Mich. 201; Cooley on Torts, 458. We are disposed to adhere to the conclusion reached in *Becker v. Staab*, so far as it announces a general rule, and to overrule prior cases inconsistent therewith.

The Holstein cow and the buggy were found to be the property of Bernard Benson at the time the bill of sale was executed and at the time they were taken on the writ.

6. MONEY judgment: waiver: title,

This finding is sufficiently supported by the evidence, and the judgment in his favor for the value of the same was properly rendered.

If he shall file a written remittitur of all in excess of the value of this property with six per cent. interest per annum thereon since it was taken, within thirty days after the filing of this opinion, the judgment as to him will stand; otherwise it will be reversed. The judgment in favor of William Benson is REVERSED.

W. B. BURGET, Appellant, v. THE INCORPORATED TOWN OF GREENFIELD, IOWA.

Practice: ABSTRACT: MOTION TO STRIKE Where a transcript of
 1 the certificate of the trial judge showing that proper steps were taken to preserve the evidence is furnished it will be presumed that this was done, and a motion to strike the evidence for failure to set out the certificate will be denied.

Sidewalk: GRADE: DEFAULT OF LOT OWNER. Where a town, pur-
 2 suant to Code, section 779, adopts an ordinance providing for the construction of sidewalks at an established grade, before the lot owner can be held in default for failure to construct the walk pursuant to an order of the council, the town must bring the bed of the walk to grade and point out the grade line.

Same: NOTICE. Where an ordinance for the construction of side-
 3 walks requires that notice shall be served on the lot owner by delivering to him a copy of the resolution ordering construction, failure to give such notice will relieve the owner of the necessity of constructing his walk at grade.

Same: Where the construction of permanent sidewalks, ordered by
 4 a town, interferes with the shade trees of a lot owner, the town is held to a strict compliance with the statute and its ordinances in relation thereto.

Same: SECOND WALK: INJUNCTION. Where the proceedings of a
 5 town council in ordering the construction of a sidewalk at grade are irregular, but one has been constructed thereunder by the lot owner, though not in conformity with the defective order, he cannot be required to construct another without a

120 432/
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 125 332
 126 684

120 432/
 d139 738

new order and notice, and he is entitled to an injunction restraining the town from constructing under the void order and notice.

Construction of Walks: GRADE: ORDINANCE. Code, section 779, 6 contemplates that permanent walks shall be constructed only at an established grade, and an ordinance and resolution which provide that they shall be so constructed unless otherwise agreed upon by the property owners and a committee of the council are void.

Appeal from Adair District Court.—HON. J. H. APPLE-GATE, Judge.

SATURDAY, MAY 16, 1903.

ACTION to enjoin the defendant town from removing, disturbing, or in any way interfering with a cement sidewalk constructed along the west side of a certain lot in said town belonging to plaintiff, who is a resident and property owner of the town; and also to restrain the town, or any of its officers, from removing or in any way injuring any of the shade trees planted along the west side of plaintiff's property between the said sidewalk and the curb line of the street. A controversy with reference to an alleged violation of a preliminary injunction issued in this case has already been before this court. See *Coffey v. Gamble*, Judge, 117 Iowa, 545. On final hearing an injunction was denied, and the plaintiff appeals.—*Reversed*.

Hager & Haddock and *H. J. Chapman* for appellant.

Frank B. Wilson for appellee.

McCLAIN, J.—In a motion submitted with the case appellee asks to have the evidence stricken from the record, because it does not appear from the abstract that such evidence has been preserved, as required by Code, section 8652, in order to secure a trial *de novo* on appeal. But it is not necessary to set out such certificate in the abstract, it be-

1. PRACTICE:
abstract:
motion to
strike.

VOL. 120 IOWA.—28.

ing presumed that the proper steps have been taken. Code section 4118. Appellant has furnished a transcript of the certificate of the trial judge, which shows that the proper steps were taken to preserve the evidence, and the motion of appellee is overruled.

Two other motions of appellee are submitted with the case, but our conclusion on the merits of the controversy renders a ruling on these motions immaterial.

The defendant is an incorporated town, having, according to the last census, a population of 1,800, and it includes within its limits a territory of about two square miles. Plaintiff has owned and occupied the lot in question as a homestead for about twenty-five years, and at or near the beginning of his occupancy either he or his grantor planted a row of trees along the west side of said lot between the sidewalk and the curb line of the street in the portion of the street which, according to the usage in that and many other towns, is appropriated to parking and the planting of trees, and these trees have grown to large dimensions, many of them being over twenty inches in diameter, and from twenty-five to forty feet high. Until the year 1893 no grades had been established in the defendant town, and the streets and sidewalks followed the natural surface of the ground, which throughout the town is comparatively level. In that year a system of grades was established, but no effort was made to bring the streets in the residence portion of the town to grade until the year 1900, when an ordinance was passed providing that whenever the town council shall desire to order the construction or rebuilding of any sidewalk along any lot they shall do so by passing a resolution to that effect, which resolution shall describe the kind and character of sidewalk to be constructed or rebuilt, the material of which and the manner in which it shall be constructed or rebuilt, its location with reference to the lot line and the street, and the time within which such construction or

rebuilding shall be completed, and shall give notice to the owners of lots where the sidewalk is to be constructed or rebuilt that unless they cause the same to be done within the time fixed by the town, it will, by its officers, proceed to construct or rebuild said sidewalk, and declare a charge and assessment, as provided by law, on the lot, sufficient to cover costs and expenses of construction or rebuilding; and, further, that in all cases where a sidewalk shall have been ordered to be constructed or rebuilt notice thereof shall be given to the owner of the lot by delivering to him a copy of said resolution, which notice shall be given in a reasonable time after the passage of the resolution, having reference to the time within which the sidewalk is to be constructed or rebuilt; and, further, that all sidewalks thereafter constructed or rebuilt shall be placed to the established grade of the street wherein they are constructed or rebuilt, unless it is provided in the resolution therefor that they may be placed on the natural surface of the ground, or unless the assent of the council thereto is first obtained; and, in case they are ordered to be placed on the grade, or the said assent of the council cannot be obtained, it shall be the duty of the town to point out the grade line, and bring the street to said line from the lot line to the curb line. This ordinance also provides that, in case of the failure of abutting property owners to construct or rebuild the sidewalk within the time fixed, the street commissioner, under the direction of the council, shall proceed to construct or rebuild the same, and return to the council an itemized statement of the cost thereof, etc.; or the council may by the resolution ordering the improvement, or afterwards, before the work is commenced by the street commissioner, order the work to be done by contract.

Pursuant to this ordinance, on the 16th day of April 1901, the town council passed a resolution ordering the construction within seventy-five days of permanent side-

walks in front of certain pieces of property described, including plaintiff's property, requiring that such sidewalks should be four feet in width, built of cement, according to plans and specifications on file in the office of the clerk, and laid at the established grade, or (when a written agreement should be presented to the council, signed by the property owners in any block where sidewalks were ordered) at a grade established in conformity to the natural surface of the ground, under the supervision of the committee on sidewalks. It appears that some dissatisfaction was expressed to the town council on the part of various property owners in connection with this order for the construction of permanent sidewalks in view of the fact that to build them at grade would necessitate their construction lower than the natural surface of the ground at places where the street itself was not at grade, and where it was not proposed to bring the street to grade, and plaintiff in particular objected then, and has objected ever since to the construction of a sidewalk on the west side and in front of his lot at the grade line, for the reason that it would result in placing the walk from twelve to twenty inches below the natural surface of the ground, thus forming a ditch for the accumulation of water on the walk during wet weather, and especially because it would result in great injury to, and practical destruction of, the trees already referred to. The objections made by other property owners were sufficiently potent to induce the town council to assent, through its committee on sidewalks, to the construction of cement walks at different grades than those fixed by the ordinance establishing a system of grades for the town, and to accept as temporary sidewalks the walks thus constructed but with reference to the walk constructed by plaintiff at a grade different from that fixed for the street it was resolved that, not having been constructed "at the grade pointed out by the committee on sidewalks, as shown by their report," and not at the established grade, the sidewalk was not accepted, either

as a permanent or temporary sidewalk, and that "notice be served on [plaintiff] to place said sidewalk at the established grade."

It is necessary, however, to a full understanding of the nature of the present controversy, that the particular facts as to plaintiff's sidewalk be noticed. On the 17th of May, 1901, he was served with notice that the council had ordered a sidewalk constructed, in accordance with the ordinance of the town; on the west side of his lot; said sidewalk to be constructed within sixty days from service of notice, and that in the event of his failure or refusal to construct said walk the work would be done by the town, and the expense assessed on the lot. It appears from the evidence that plaintiff made objection, as other property owners had done, to the construction of this walk at grade, for the reasons already pointed out; whereupon the chairman of the sidewalk committee visited the premises, and consented that the walk should be constructed at a compromise grade agreed upon between him and the plaintiff, which was higher than the established grade. There is a conflict in the evidence as to whether the grade of the walk as plaintiff proceeded to construct it corresponded throughout with that designated and approved by the chairman of the committee, but there is no controversy as to the fact that plaintiff had the authority of said chairman to construct his walk at a different grade from that established for the street. On June 12th, when this walk was nearly completed, the marshal and street commissioner of the town, purporting to act by direction of the sidewalk committee, notified plaintiff to cease the construction of the sidewalk at any grade other than that established by the town of Greenfield or that pointed out by the sidewalk committee. Plaintiff nevertheless completed the walk, and it is this walk which, as already stated, is not accepted by the city, and which, as plaintiff alleges, the officers of the defendant are about to tear out, and substitute with another walk at grade.

There are several difficulties in the way of sustaining the action of the council of the defendant town in its proposal to tear out the plaintiff's walk and put it down to the theoretical grade line of the street as established in 1893, with the resulting effect of a walk below the natural surface of the street, and without any purpose on the part of the council to bring the street itself to grade, and with the further effect, also, of practically destroying the trees which are growing in front of plaintiff's premises. If city and town councils under the advice of city engineers, feel it necessary to establish a paper grade, different from that of the natural surface of the ground, without any intention to improve the streets with reference to such paper grade, there ought to be some way to provide good sidewalks without digging ditches or destroying trees, until the actual improvement of the street is found necessary. We doubt very much whether it was within the contemplation of the Legislature that so-called permanent walks at grade should be required until the streets are improved and brought to the established grade. But the view which we take of this case does not make it necessary for us to finally determine that question.

In this case the action of the council as originally taken with reference to a sidewalk in front of plaintiff's premises contemplated a permanent walk, and we are to determine the validity of the entire proceedings under that assumption. A condition precedent to the construction of a permanent walk was the bringing of the bed of the same to grade (Code section 779), and this was to be done by the town. The council, however, required plaintiff to construct a permanent walk without providing for bringing the bed of the walk to grade and without doing so in fact. Neither did the town point out the grade line. These things it was required to do, not only by inference from the statute, but by express provision of its general ordinance above re-

2. SIDEWALKS:
grade: de-
fault of lot
owner.

ferred to. Where a city has undertaken to avail itself of the provisions of the statute, and has fixed in its general ordinance the mode of procedure, it is limited to the mode prescribed in the ordinance. *Zelie v. Webster City*, 94 Iowa, 393. It was, therefore, impracticable for the plaintiff, at the time when the cement sidewalk in question was first ordered by the council, to comply with the order, and he is not in default in not having done so.

Moreover, the ordinance requires, as already recited, that where a permanent sidewalk shall have been ordered to be constructed or rebuilt, notice thereof shall be given to the owner of the abutting lot by delivering to him a copy of said resolution, which notice shall be given in a reasonable time after the passage of the resolution; and it appears from the evidence that no such notice was given. The notice which plaintiff received was not accompanied by any copy of the resolution of the council, and the requirements of the ordinance were, therefore, not complied with.

In view of the fact that the right of plaintiff to maintain and preserve his row of trees, planted in the portion of the street where it is usual to plant trees, and where the trees furnish no obstruction to travel

3. SAME: notice.

4. SAME.

either on the sidewalk or in the street, is involved in the case, we feel justified in holding the town to a strict compliance with the terms of the statute and its own ordinance. That trees in the street are not necessarily a nuisance where they do not obstruct travel, and that it is in accordance with public policy to preserve them if practicable, is too well settled by the previous adjudications of this court to require more than a citation of the authorities. See *Everett v. Council Bluffs*, 46 Iowa, 66; *Bills v. Belknap*, 36 Iowa, 583; *Quinton v. Burton*, 61 Iowa, 471; *Richardson v. Webster City*, 111 Iowa, 427; *Blanden v. Ft. Dodge*, 102 Iowa, 441; *Stretch v. Cassopolis*, 125 Mich. 167 (84 N. W. Rep. 51, 51 L. R. A. 345, 84 Am. St. Rep. 567.)

As the proceedings of the council with reference to requiring the construction of the walk which was actually constructed were irregular and insufficient, plaintiff cannot be required now to construct another

5. SAME: second walk: injunction.

walk at the established grade until there has been a further resolution and a further notice thereunder, as required by the ordinance. It is contended, however, that the resolution and notice are material only as bearing upon plaintiff's liability to pay the assessed cost of the new walk, should one be constructed, and therefore, that plaintiff's only right, by reason of failure to take the proper proceedings, is to resist the payment of any special assessment which shall be made after his trees are destroyed and the walk is constructed by direction of the council. But we do not so understand the law. The interest of the property owner in the grading of the street in front of his premises and in the preservation of the trees growing there, so far as they do not constitute a nuisance, can be interfered with or affected only in the mode pointed out by the Code and the ordinances adopted under its authority. The bringing of the sidewalk to grade and the destruction of the trees would cause damage to plaintiff's property, which could be but inadequately compensated by a money judgment, even if recovery of a judgment for damages were a remedy available to plaintiff, and therefore he is entitled to an injunction to restrain the unauthorized action of the town council.

There are other difficulties, however, in the way of any proceeding by the council under the ordinance and resolution already adopted as we have already indicated the council cannot require cement sidewalks, or other permanent sidewalks, except as they shall be placed at grade; and it appears from the ordinance already referred to that it does not provide for the construction of such walks at grade absolutely, but only on the contingency that it is not provided in the resolution there-

for that they may be placed on the natural surface of the ground, or the assent of the council thereto is not first obtained; and the resolution passed in pursuance of this ordinance did not absolutely require the laying of such walks at the established grade, but provided that they should be so laid unless a written agreement of property owners in the block should be presented to the council, consenting to establishment on the natural surface. Furthermore, in the resolution declaring plaintiff's sidewalk not to be constructed in accordance with the provisions of the ordinance and resolution, it is recited that the sidewalk is not accepted because it was not constructed at the grade pointed out by the committee on sidewalks, nor at the established grade. The whole course of procedure suggested by the ordinance and resolution and shown by the evidence to have been pursued with reference to the construction of sidewalks in defendant town was vicious and unlawful. Instead of establishing a grade such as was desirable and proper for each block, the council established a wholly artificial grade line, and then proceeded to compel the construction of permanent sidewalks, not in accordance with this grade, but in accordance with some grade to be fixed upon by the council or the sidewalk committee, with a penalty that, if the property owner did not comply with such direction, he should be compelled to construct his walk at this artificial grade, without regard to his own convenience or the public welfare. The statute does not recognize a compromise grade, to be established in each particular case by some committee; and the ordinance and resolution under which the council attempted to require a permanent sidewalk in the first instance, and in pursuance of which they now propose to tear up plaintiff's walk and put another in its place against his protest and by way of penalty for not having constructed the first walk in accordance with the order of the council, which did not con-

6. CONSTRUCTION of walks: grade ordinance.

template a sidewalk at the established grade except in the event that some compromise grade should not be agreed upon, are not such as the statute authorizes, and therefore are void and ineffectual so far as this proceeding is concerned.

It may not be out of place here to say that the trial judge, in a written finding, expresses his dissatisfaction with the provisions of Code section 779, as he has felt himself compelled to construe them, and with the result as applied to this particular case. But, having determined that the agreement of plaintiff as to the grade of the walk was with the chairman only, of the sidewalk committee, and not with the committee as a whole, he found it necessary, as he indicates, to reach the conclusion that plaintiff was not entitled to relief. For reasons pointed out, we have reached a different conclusion.

The judgment of the lower court is reversed, and the case is remanded for decree in plaintiff's favor in harmony with the views expressed in this opinion.—REVERSED.

H. H. SHERIFF V. CITY OF OSKALOOSA, Appellant.

Sewers: INSUFFICIENT CAPACITY: BACK WATER: DAMAGE TO PROPERTY OWNER. A property owner who voluntarily constructs a sewer from the basement of his building to the city's main sewer, paying the required fee for permission to do so, and knowing that the city sewer is insufficient at times to carry the surface water and sewerage and that other connected cellars near his own had been flooded, has no right of action against the city for damages caused by the flooding of his cellar by backwater from the city sewer.

Appeal from Mahaska District Court.—HON. A. R. DEWEY,
Judge.

MONDAY, MAY 18, 1903.

THE plaintiff was the owner of a corner building, with a basement, located on the south side of High avenue, at its intersection with D street, in the city of Oskaloosa. The city built a main sewer along the avenue by the plaintiff's property, and paid for it by a general assessment. There was no ordinance requiring the plaintiff to connect therewith, but by permission of the city authorities he built a lateral sewer to the basement of his building, and paid the city the required fee for a connection with the avenue main. A heavy flow and great pressure of water in the main sewer caused it to back up through the plaintiff's pipe and flood his cellar. This action is to recover damages therefor. There was a trial to a jury, and a verdict and judgment for the plaintiff. The defendant appeals.—*Reversed.*

McCoy & McCoy for appellant.

H. H. Sheriff and *L. C. Blanchard* for appellee.

SHERWIN, J.—It is not necessary to discuss the general liability of municipal corporations for damages caused by the improper construction, maintenance, or insufficiency of its public sewers, because of our conclusion on another branch of the case; and for the same reason we shall not further notice the errors alleged in the rulings on the introduction of testimony. The use of the defendant's sewer by the plaintiff was purely voluntary, and with the knowledge that it was of insufficient capacity to carry off the surface water and sewage which collected therein. The plaintiff testified that for nearly a year before he was damaged he knew of the flooding of other cellars along the same avenue and near his own property, and that he asked the authorities to permit him to turn some of the water from the catch-basin for the protection of his cellar and for the purpose of preventing the very overflow of which he now complains. If it be conceded, for the pur-

poses of this case, that when he connected with the sewer he was authorized to presume that it was reasonably sufficient to take care of the usual and ordinary amount of water and sewage flowing thereto, it would not avail him because of his subsequent knowledge that such was not the case, and the warning such knowledge gave him. After this knowledge was acquired by him he continued his open connection therewith at his peril, and has no legal right now to ask that his mere license to make such connection be construed into an insurance on the part of the city that the sewer was sufficient for the work intended. *Breuck v. City of Holyoke*, 167 Mass. 258 (45 N. E. Rep. 782); *Buckley v. City of New Bedford*, 155 Mass. 64 (29 N. E. Rep. 201); *Dermont v. Mayor*, 4 Mich. 435; *Roll v. City of Indianapolis*, 52 Ind. 547. This is not a case involving the negligent or unlawful disposition of surface water. The defendant was attempting to take care of such water, and to take it away from the plaintiff's premises through its sewer, while he by his private drain diverted it into his cellar. The plaintiff had no cause of action, and a verdict should have been directed for the defendant.—REVERSED.

L. B. DUNTON v. THOMAS MCCOOK, Appellant, A. E. MUNSON, Administrator of Estate of A. F. Tyrrell, Deceased, AND HATTIE M. MUNSON *et al.*, Heir-at-law of A. F. Tyrrell, Appellees, AND BLAKE & COMPANY, v. THOMAS McCOOK, Garnishee, Appellant.

Jurisdiction: APPEAL: REVIVAL OF CAUSE. The district court
 1 loses jurisdiction of the parties and the subject-matter of the suit when an appeal is taken, and upon affirmance of the decree without an order remanding the cause the issuance of a *procedendo* will not revive it.

120	444
123	194
120	444
133	25
120	444
138	35

Enforcement of Judgment. Although an appeal deprives the district court of jurisdiction of the action, it still has power, on affirmance of its decree, to enforce its judgment by proper orders.

Discharge of Judgment: Anyone interested in the enforcement of a judgment, having matters of discharge which have arisen since the decree, may, upon motion, under the statute and in a summary way have the same discharged.

Same. Where a decree is affirmed, which determines that defendant holds title as trustee which may be divested on payment of a fixed sum, it is proper for the *cestui que* trust to show that since the rendition of the decree defendant has been wholly or partially paid from rents and profits arising from the land; and this may be done on a supplemental petition.

Issues Subsequent to Decree: DETERMINATION OF: Where the defendant raises issues in his answer to a supplemental petition to discharge a judgment, he cannot complain that the court was without jurisdiction to try and determine all the issues raised subsequent to the entry of the original decree.

Adverse Possession: CLAIM FOR RENTS. Any claim of defendant to the property by adverse possession, or to rents therefrom which the decree adjudged him to hold as trustee subject to payment of the amount due him, cannot antedate the entry of such decree.

Appeal from Mitchell District Court.—HON. CLIFFORD P. SMITH, Judge.

MONDAY, MAY 18, 1903.

IN *Dunton v. McCook*, 98 Iowa, 258, this court affirmed a decree of the district court, entered May 18, 1892, to the effect that a deed of certain real estate executed by A. F. Tyrrell to Thomas McCook in 1875 was in fact a mortgage to secure the payment of certain advances made by the latter from sales, and rents and profits collected; that upon accounting \$524.44 was still owing January 1, 1890; that upon payment thereof "said Tyrrell will be entitled to a reconveyance of the premises remaining unsold, and upon payment of said sum it is ordered that said defendant McCook reconvey said premises to the said defendant Tyrrell,

and, upon failure to so convey, the judgment and decree shall have the full force and effect of such a reconveyance." The judgments of Dunton were also decreed to be liens on the premises. A rehearing was denied June 1st, and a procedendo filed in the district court June 22, 1895; and on the 6th of February, 1896, leave was asked by plaintiff to file a supplemental petition. Over McCook's objections, such leave was granted, and the petition filed May 9, 1896, in which, after giving a history of the case, it was alleged that McCook had been in possession of the premises since January 1, 1890, and had received more than enough rents and profits to cover the balance due him; and an accounting was prayed, and also a decree that his claim be satisfied, and the relief previously awarded enforced. The defendant McCook's motion to strike, and demurrer, on the ground of such a pleading not being permissible after final decree, were overruled, and he then answered. Tyrrell having died May 22, 1896, his administrator, A. T. Munson, was substituted as party defendant, and in his answer, filed October 11, 1898, admitted plaintiff's allegations, and alleged the right to immediate possession. October 1, 1901, plaintiff, by leave of court, made the heirs of Tyrrell parties defendant; and thereupon they and the administrator, in addition to admitting the facts as pleaded by plaintiff, asked to be awarded the rents and profits found due, and the title to the property. Upon hearing the court found the indebtedness to McCook was canceled by rents and profits collected up to February 2, 1896; that he should account to the administrator from the time of Tyrrell's death, \$64; that he should account to the heirs from that time to the date of the trial, October 2, 1901, in the sum of \$888, less \$150 directed to be paid on garnishment—and entered a decree accordingly, and also awarded said heirs immediate possession, and confirmed the liens of plaintiff's judgments, directing sale thereunder. The defendant McCook appeals.—*Affirmed.*

John McCook and G. E. Marsh for appellant.

W. L. Eaton for appellees.

LADD, J.—The original decree in this case was entered in the district court May 18, 1892. Upon appeal that court lost jurisdiction. As said in *Levi v. Karrick*, 15 Iowa, 444: "When appeal is taken, all power of the court below over the parties and subject-matter is lost until the cause, or some part thereof, is remanded back, by order of this court, for its further action." *McGlaughlin v. O'Rourke*, 12 Iowa, 459; *Stillman v. Rosenberg*, 111 Iowa, 322. But pending such appeal the decree continued in full force for all purposes. *Watson v. Richardson*, 110 Iowa, 698. It was affirmed in this court January 18, 1895, and petition for rehearing denied June 1st of that year. That ended the suit. Thereafter it was pending in neither court. The affirmance was merely a ratification of what had been done in the lower court, and left the parties in precisely the same situation as though no appeal had been taken. *U. S. v. Jones*, 26 Fed. Cas. 638 (No. 15,492); *Steinback v. Stewart*, 11 Wall. 566 (20 L. Ed. 56); 3 Cyc. 422; *Werbhorn v. Pinney*, 76 Ala. 291. Under our practice a new decree is not entered in the Supreme Court upon affirmance, but that of the court below confirmed, with a judgment for costs added. As the cause was not remanded for any purpose, the district court did not acquire jurisdiction to retry any of the issues subsequent to appeal. The suit having been terminated, the clerk could not revive or open it again by issuing a procedendo. The only purpose for that process in such a case is to notify the district court that it is at liberty to enforce its decree. In *Steel v. Long*, (Iowa) 84 N.W. Rep. 677, an order of the district court striking a cross-petition filed subsequent to the affirmance of the original decree was approved, the court saying: "Not a thing remained for the trial court to do, nor was it directed to take further

1. JURISDICTION: appeal: revival of cause.

action in the matter. The original action was therefore at an end, so far, at least, as the district court was concerned, and the defendant had no right to then file a cross-petition. If the position contended for by appellants were tenable, there would be no end to a cause of action. If a cross-petition may be filed and new parties brought in one week after final determination by decree it might, under such circumstances, be permitted one, two or three years thereafter." To the same effect, see *McCall v. Webb*, 126 N. C. 760 (36 S. E. Rep. 174); *Greenwood Township v. Richardson*, (Kan.) 62 Pac. Rep. 430; *Herstein v. Walker*, 90 Ala. 477 (7 South. Rep. 821). So far as the questions at issue were concerned, the suit, upon affirmance, became a part of the irrevocable past.

II. But no attempt was made in the subsequent pleadings to change or modify the decree. The object sought related solely to the enforcement of that already rendered. True, the pleading filed by plaintiff is designated a "supplemental petition," and, as contended, was not such as is contemplated by section 3641 of the Code. *Leach v. Germania Building Ass'n*, 102 Iowa, 125; *Forte v. Burlington Gaslight Co.*, 103 Iowa, 576; *Allen v. Davenport*, 115 Iowa, 20. But the name by which it was labeled is not material. Though the court had lost jurisdiction of the suit, it had not of the decree. It still retained the inherent power to enter appropriate orders for its enforcement. In *Hartley v. Bart-ruff*, 112 Iowa, 592, in approving an order extending the time fixed in the decree for redemption, we said: "The manner and time of carrying a decision into effect never rests upon evidence, in the sense that evidence controls these questions. These are always to be determined by the court, unaffected by the proof; and we can conceive of no good reason why, in a proper case, a decree may not be modified in the respect proposed." One of the advantages of a court of equity is that its decrees may not only be

2. ENFORCE-
MENT of
judgment.

so framed and molded as to protect the relative rights and duties of the parties, but its execution may be controlled, or even suspended for a time, as exigencies arising may require. Formerly decrees were executed by the parties; their obedience being compelled by proceedings in the nature of punishment for contempt, attachment, or sequestration. Statutes providing for other methods of enforcement, as by execution, are not usually construed to deprive the court of the power of general supervision of the enforcement of its decrees. Moreover, our statute expressly authorizes: "A defendant against whom a judgment has been rendered, or any person interested therein,

3. **DISCHARGE** of judgment. having matter of discharge which has arisen since the judgment, may upon motion, in a summary way, have the same discharged, either in whole or in part, according to the circumstances." By "defendant" is meant the party against whom the judgment or decree has been entered, and not necessarily the defendant in the suit; and the term "judgment" is employed in the statutory sense, being any "final adjudication of the rights of the parties in an action." Section 3769, Code.

The original decree determined that McCook held title as trustee, which might be divested upon the payment of a fixed amount by Tyrrell. If, because of matters trans-

4. **SAME.** piring subsequent to the entry of decree, McCook had been partially or fully paid, either from rents and profits by him collected, or from any other source, plaintiff or Tyrrell had the undoubted right to invoke the jurisdiction of the court, either under the statute quoted, or by virtue of the inherent powers a court of equity may exercise over its decrees, and have the demand, to that extent, satisfied. That this was done by a pleading denominated a "supplemental petition," instead of a motion, ought not to deprive them of the remedy.

But for the answer of defendant, it should have been treated as a motion, and all therein aside from that relating to a proper accounting and application of the rents regarded as surplusage. And had McCook been content to submit plaintiff's motion, without raising other issues, there might be something in his objections to the petitions of intervention by the administrator and heirs of Tyrrell. Instead of doing so, he filed an elaborate answer, in six divisions, to which two amendments were added in 1901. The portions remaining after the rulings on demurrers and motion were that defendant had collected rents amounting to \$2,104.16, and paid out \$534.40; asked an allowance for services of \$50 per year; that he had denied Tyrrell's right to the property in 1886 or 1888, and no effort had been made to enforce the decree or make redemption; that he had been in adverse possession, and the right to the land and the rents had been lost by the running of the statute of limitations. Having raised these issues, he is not in a situation to say that the court might not consider and pass upon any issues raised subsequent to the entry of the original decree. They directly affected the interests of the administrator and heirs, for the former was entitled to the rents collected prior to Tyrrell's death, and the latter to those collected thereafter. To protect these and the heirs' claim to the property, they had the right to intervene and by so doing acquiesced in the trial of the issues raised by the defendant. To their petitions he interposed substantially the same matters in defense, and also pleaded that he had been garnished as the supposed debtor of Tyrrell. It is the defendant, then, who has injected matter in this proceeding more appropriate to another action. Having done so, and all issues raised having been voluntarily submitted to the court, it acquired jurisdiction over the parties and subject-matter.

5. Issues subsequent to decree: determination of.

III. Appellant argues that there has been an unreasonable delay in enforcing the former decree. It was not approved by this court until January 18, 1895. Leave to file the petition was procured February 6, 1896, and it was filed in July following. Defendant had been fully paid by rents collected when leave was sought, and prior thereto there had not been such laches as should deprive the parties of the benefit of the decree. No obstructions were interposed to compliance therewith by him. For all that appears from the record, he was as much at fault for the delay since as others. The decree defined the rights of the respective parties, and any claim of defendant by way of adverse possession cannot antedate its entry. It seems needless to add that the statute of limitations has not run against the decree.

Other matters discussed were disposed of in the previous opinion.

The decree of the district court is affirmed, with direction that the cause be remanded only for the purpose of taking an accounting between the heirs and defendant for rents and profits from the date of the last decree up to the present time, and thereupon entering judgment for the amount found owing either party.—AFFIRMED and REMANDED.

SHERWIN, J., took no part.

S. PERCIVAL, Appellee, v. IDA H. YOUSLING, Appellant.

Nuisance: ABATEMENT OF. The fact that a nuisance may also affect

- 1 others in the vicinity injuriously will not affect the plaintiff's right to maintain a suit to abate the same, under Code, section 4302.

Nuisance: EVIDENCE. Evidence that defendant maintained a

- 2 dumping ground for garbage, manure and other refuse, near

plaintiff's dwelling, causing a stench and that there had been several cases of fever in plaintiff's family during the time same was maintained is considered, and held sufficient to support a finding that the place was a nuisance.

Approval of Record. The fact that the record of a case is not approved until the succeeding term is not prejudicial error.

Reopening Case. A ruling reopening a case for further testimony will not be disturbed in the absence of a showing of abuse of the court's discretionary power.

Appeal from Ida District Court.—HON. S. M. ELWOOD,
Judge.

MONDAY, MAY 18, 1903.

THE opinion states the case.—*Affirmed.*

Macomber & Bradshaw for appellant.

Hastings & Brasted for appellee.

WEAVER, J.—Plaintiff alleges that certain lots owned by defendant in the vicinity of plaintiff's residence in the town of Ida Grove are used as a dumping ground or place of deposit for garbage and other refuse and decaying matter, creating a nuisance to the injury of plaintiff and others, and he asks that its maintenance be enjoined. Defendant denies the allegations of the petition. There was a trial to the court and finding in plaintiff's favor.

The evidence tends to show that defendant has deposited, or allowed others to deposit, in a gully or ravine on lots owned by her, considerable quantities of refuse, more particularly stable manure; that it was the source of more or less complaint in the community; that the town authorities had at one time interfered, and ordered the offensive material covered with earth; and that some effort had been made to comply with this order, but the covering was incomplete. Several expert witnesses testified that the condition of the premises was unsanitary, one

physician describing it as a "menace to the community, and a breeding place for malarial and intermittent fevers"; though others, while conceding its unsanitary condition, thought it a source of no special public danger. After the parties had once rested their case, it was reopened upon application of the plaintiff, who further testified that the stench from the material dumped upon these lots was such that at times in warm weather he was compelled to keep the windows of his residence closed, and that there were several cases of fever in his family during the existence of the alleged nuisance. There was more or less conflict in testimony upon all these points, but the preponderance tends to sustain the finding of the trial court.

It is somewhat doubtful whether there is any such showing of an entry of judgment as will sustain an appeal. The so-called "judgment" quoted in the abstract is simply the memorandum made by the trial judge in his calendar. Ordinarily, this would require a dismissal of the appeal (see *Kennedy v. Bank*, 119 Iowa, 128, and cases there cited); but counsel, in argument, appear to concede that the judge's entry was carried by the clerk into the record, and approved at the next succeeding term of the court, and, as no objection is raised by the appellee to the sufficiency of the showing, we proceed to an examination of the questions submitted.

I. Appellant insists that there was no evidence of any damage or injury to plaintiff which was not suffered by him in common with the entire community, and he is, therefor, not entitled to maintain the action.

1. NUISANCE:
abatement
of. This view ignores much of the evidence offered. Plaintiff's residence was within a short distance of the dumping ground. If the conditions prevailing upon such ground were of a nature to render it unsanitary, taint the air, and promote disease and discomfort among those living in that neighborhood, the plaintiff's right to sue is clear, even though there be others who suffer like

injury. Such conditions would certainly tend to "essentially interfere with the comfortable enjoyment of his life and property." Code, section 4802.

It is objected, however, that the evidence does not show such conditions; that the manure, being in a ravine, and partially covered, was not in view of plaintiff's residence, and therefore his "delicate taste was in no way disturbed through the eye" by the acts of the defendant; and that, while physicians testified "that germs of malaria might have been in some mysterious manner carried over three hundred feet in the arms of a summer breeze and landed in the blood of plaintiff's children," appellant nevertheless declares this testimony to be unscientific, and therefore unworthy of consideration. He says: "Dr. Moorehead did testify that it was impossible for malaria to be transmitted to the human family except by the bites of mosquitoes and other insects. I cannot believe that the Supreme Court of my state will refuse to hold that it is now the established truth that malaria can only be carried to the human family by the bites of insects." The argument is not entirely convincing. The fact that the foul material upon defendant's premises was not in a place to offend the plaintiff's eye is not a sufficient answer to the complaint if the noxious influence and effects arising therefrom were a source of inconvenience, discomfort, or danger to the plaintiff and his family, and the evidence tends to disclose such a condition of things. The history of disease germs; their origin, their methods of locomotion, and attack upon the human body; whether they make their insidious approach through the water we drink, the food we eat, the air we breathe, or are inserted hypodermically by mosquitoes—cannot be considered so fully and clearly settled by specialists that we may, as a matter of law, hold any one of these theories true and all others false. But, even if the theory of transmission by mosquitoes be correct, it does

2. **NUBANCE:**
evidence.

not follow that filth upon defendant's lot would be any the less a nuisance or source of danger to the plaintiff. Indeed, if the disease-breeding material existed there, as the testimony of the physicians indicates, the very fact that these insects were carriers of such poison would seem to make the danger to persons living in the neighborhood more imminent. It is said to be but about three hundred feet from the alleged nuisance to the residence of plaintiff, and we think it has never been demonstrated that a flight of this short distance is sufficient to render the mosquito innocuous.

II. We are also asked to reverse the judgment below because the record entry by the clerk was not made—or, rather, if we fully understand counsel, the record was not signed and approved by the court—until the next term after the entry in the judge's calendar. This does not constitute prejudicial error. *Van Fleet v. Phillips*, 11 Iowa, 558.

We may also say of the reopening of the case for the reception of further evidence, of which complaint is made, that such orders are peculiarly within the discretion of the trial court, and there is nothing in this record from which we can say that the discretion was abused.

The judgment of the district court is AFFIRMED.

LEO WOLFSON, Appellee, v. ALLEN BROTHERS COMPANY,
Appellant.

Sales: COMMISSION CONTRACT: REJECTION OF ORDERS. A contract

- 1 providing that an agent shall receive a commission for the sale of goods on all orders taken by him which his principal may "accept and ship" is binding to the extent only of the accepted orders, in the absence of a showing of bad faith on the part of the principal in rejecting orders.

Commissions: BAD FAITH OF PRINCIPAL: EVIDENCE. In an action
2 by an agent for commissions for the sale of goods, where it is
claimed that the principal was to accept and fill all orders
from persons having a certain rating, but that he acted in bad
faith in refusing to fill certain orders, it must appear, in
order to bind the principal, that the credit rating of such re-
jected customers was one known to and in use by the defend-
ant, and private information obtained by the agent as to the
responsibility of such customer is inadmissible for the purpose
of establishing bad faith.

Financial Responsibility: EVIDENCE OF. For the purpose of
8 establishing the financial standing of parties it is incompetent
for a witness to testify to their reputation, and in the absence
of knowledge, except that gained from general reputation, a
witness is incompetent on the question of the financial respon-
sibility of another.

Sales: CAR LOAD LOTS: BURDEN OF PROOF. Where the contract
4 between the manufacturer and his agent provided that the
agent should be paid commissions on his approved sales, but
the sales must amount to car load lots; held, in an action by
the agent for his commissions on orders not filled that the
burden was on him to show such orders to the amount of a
car load.

Appeal from Pottawattamie District Court.—HON. O. D.
WHEELER, Judge.

MONDAY, MAY 18, 1903.

ACTION to recover commissions on goods alleged to
have been sold by plaintiff for the defendant company.
Trial to a jury. Verdict and judgment for plaintiff, and
defendant appeals.—*Reversed.*

Mayne & Hazelton and Gaines, Kelby & Storey for
appellant.

G. H. Stillman and Stone & Tinley for appellee.

DEEMER, J.—On May 24, 1899, the parties hereto en-
tered into the following contract:

"Articles of agreement entered into by and between
Leo Wolfson of Dallas, Texas, and Allen Bros. Co. of

Omaha, Nebraska, this 24th day of May, 1899, whereby said Allen Brothers Company hereby appoint said Leo Wolfson general agent for the sale of 'C. P. Baking Powder' in the State of Texas and Shreveport La. on the following terms: Leo Wolfson is to receive a straight commission of two and one-half (2.50) dollars on every barrel of C. P. Baking Powder which he or his employes may sell in the State of Texas and which orders Allen Bros. Co. may accept and ship, with the privilege of drawing same at any time any amount may be accruing to him, it being understood that this commission arrangement will apply not only to the original orders but upon duplicates and mail orders received and accepted during the term of this contract.

"A barrel of 'C. P.' Baking Powder is to contain at least fifteen (15) dozen cans assorted to suit purchaser it being preferable, however, that each barrel contain the regular assortment consisting of five (5) dozen ten (10) ounce cans, five (5) dozen fifteen (15) ounce cans and five (5) dozen twenty-five (25) ounce cans.

"The price at which 'C. P.' Baking Powder shall be sold in the State of Texas will be eighty (80c.) per dozen for the ten (10) ounce cans, one dollar and fifteen (\$1.15) for the fifteen ounce cans and one dollar and eighty cents (\$1.80) for the twenty-five ounce cans, delivering at Fort Worth, Dallas, Waco, Austin or Houston, provided a sufficient number of barrels have been sold in each of the above named cities and tributary territory to equal the capacity of a car, it being understood that the intention is to ship 'C. P.' Baking Powder to the principal cities of Texas in carloads for distribution from those points to the surrounding territory.

"Allen Bros. Co. agree to liberally advertise, through the mail and otherwise by their usual system, every barrel of Baking Powder sold through Leo Wolfson, and also to sample such cities as they may consider preferable to the

usual mail advertising, and at all times to the best of their ability give the most prompt and satisfactory service of which they are capable. Leo Wolfson agrees to accept the above proposition and to employ a sufficient force of traveling men at his own expense to thoroughly canvass the various parts of the state of Texas and prosecute the sale of 'O. P. ' Baking Powder in Texas.

"Allen Bros. Co. agree to pay the actual transfer expenses in connection with the distribution from each as it may be shipped on orders taken by Leo Wolfson or his representatives. And it is further agreed and understood that this arrangement may be terminated at any time that it may prove unprofitable to either party upon giving written notice of such termination."

Plaintiff says that he took two hundred and fifty-one orders of one barrel each for baking powder, of which defendants accepted and shipped one hundred and thirteen; that it refused and neglected to ship one hundred and thirty-eight orders from reputable and financially responsible merchants in the state of Texas. He further alleged that defendant agreed to accept and fill orders from all merchants who had a credit rating of \$500 or more, and to pass upon orders from merchants having less than that rating as soon as possible; that, acting on this, plaintiff was at large expense in procuring the one hundred and thirty-eight orders, and that, after obtaining them, defendant arbitrarily, and without just cause or excuse, refused to accept the orders, although the parties from whom they were taken had the necessary credit rating. These last allegations are based on letters to the plaintiff under dates of July 4 and July 13, 1899, respectively, which we reproduce in order that the exact claims of the parties may be understood:

"Leo Wolfson, Esq., Dallas, Texas—Dear Sir: We regret that we cannot accept the order sold to Mr. J. Dreeborn from the fact that the quantity sold would not justify

an acceptance. We also regret to state that we are in receipt of a letter from B. Trippett this morning canceling the order he gave you on the 29th.

"Please impress upon the minds of all your representatives the importance of selling only to the better class of trade as there is certainly neither money or glory in taking orders from irresponsible parties. Where orders are sold to parties having any reasonable rating, credits are passed upon at once without further inquiry, but where the man is rated with a capital of less than \$500.00 with no credit rating whatever, we are obliged to ask for special reports and this takes usually about ten days to receive the report.

"Yours truly, Allen Bros. Co."

"Leo Wolfson, Esq., Dallas, Texas—Dear Sir: In regard to your favor of the 9th inst. suggesting that we furnish you with authority to make application to the Mercantile Agencies in order to expedite matters would say that all merchants having any rating of \$500.00 or over receive the powder without any further investigation, and as no doubt a large portion of your orders will be taken from merchants who are better fixed than this, there would be many requests for special reports, all of which cost money and which will be necessary to be had. In view of this fact we do not think it would be advisable to do as you suggest and on the small merchants who have no rating whatever, we assure you we will expedite matters as rapidly as circumstances will permit.

"Yours truly, Allen Bros. Co."

Defendant denied on information and belief the genuineness of the signatures to the orders in controversy. It admitted the receipt of what purported to be one hundred and twenty-one of these orders, says that twelve or thirteen were countermanded by the parties who gave them, and that none of the others were accepted by them. It denies that it willfully, arbitrarily, and without cause

refused to accept the orders, and says that they were rejected because the parties did not have sufficient credit rating. The case was submitted to the jury on the theory that plaintiff should show that he forwarded to defendant genuine orders for at least a car load—one hundred barrels—of baking powder, which were received by it; that they were from reputable and financially responsible merchants, willing and able to pay for the goods; that defendant accepted these orders, or arbitrarily, wantonly, willfully, and without just cause, refused to accept and ship the same; and that of the orders accepted by defendants those from purchasers having a rating of \$500 or over, and from purchasers not having such a rating which were rejected in bad faith, there must have been one hundred in order to entitle plaintiff to recover anything.

The contract provides that plaintiff is to have a commission on orders which "defendants may accept and ship." This is a valid agreement, and, in the absence of a showing of fraud or bad faith on defendant's part, plaintiff was not entitled to a commission on any orders taken by him which were not accepted and shipped. *Walker v. Tirrell*, 101 Mass. 257 (8 Am. Rep. 352); *Sanderson v. Tinkham*, 83 Iowa, 446.

It is a time-honored maxim that no man shall take advantage of his own wrong; but in a case like the present, where a large discretion is vested in him who is to act, the evidence as to bad faith or wrong motive must be clear and satisfactory. As bearing on this question, the letters from which we have quoted were unquestionably admissible, and plaintiff, in so far as this appeal is concerned, may properly insist that orders from all persons having a credit rating of \$500 or more should be counted as accepted.

But this credit rating must have been one known to and in use by the defendant, and not some private rating or financial standing procured by and known only to

1. COMMISSION
contract;
rejected
orders.

2. COMMISSIONS;
bad faith of
principal;
evidence.

plaintiff. The parties evidently had in mind the well-known agencies, such as Dun's and Bradstreet's; indeed, the evidence leaves no doubt whatever on this subject. As to orders from parties having a less rating than \$500, the defendant undoubtedly had a wide discretion about accepting them, and according to the letters on which plaintiff relies it was privileged to, and in fact undertook to, procure special reports, and on the strength of these reports to give credit or not, as it saw fit, so long as it acted in good faith. Of the orders in dispute ninety-two had a rating of less than \$500. Ten of the one hundred and thirty-eight orders were canceled by the parties making them before acceptance by the defendant. So that at most but thirty-six orders met the requirement exacted by the defendant in its correspondence. To meet this situation, plaintiff and another witness were placed on the stand to show that the parties from whom the orders were taken had a commercial standing entitling them to credit for the amount of their orders. Much of this evidence was of no value whatever, as the witnesses did not know the parties, had never been in the towns where their business was carried on, and knew nothing of their financial worth or standing except as gathered from commercial travelers or from local trade journals. The parties had no rating in the reports of the well-recognized agencies, and defendant, in so far as shown, had no knowledge or notice of their standing except as gathered from special reports received by them from the Dun and Bradstreet Agencies. In other words, defendant did not, so far as shown, have any knowledge of the information which plaintiff says he obtained as to the responsibility of the parties who made the orders. Surely, this private information obtained by him, and of which defendant had no notice, should not alone be considered as evidence of bad faith on the defendant's part. The evidence, if admissible at all, tended to prove that in some instances the parties may have been entitled

to credit for the amount of their orders, but this alone would not make out a case of bad faith on the part of defendant in rejecting them.

Moreover, much of the testimony given by these witnesses was incompetent, and the objections thereto should have been sustained. The witnesses were not asked as to

3 FINANCIAL
responsibility; evi-
dence of. their knowledge of the financial standing of the parties whose order were taken, but as to their reputation. This was improper. *Sheldon*

v. Root, 16 Pick. 567 (28 Am. Dec. 266); *Hall v. Ballou*, 58 Iowa, 585; *Iselin v. Peck*, 2 Rob. 629. In *Lacy v. Kossuth Co.*, 106 Iowa, 23, after reviewing the authorities, we held that a witness who had made an investigation as to the amount of property possessed by another might testify that such other had no property out of which a bill might be collected; but we expressly affirmed the rule that a witness who had no knowledge except that gained from general reputation or other hearsay sources could not testify as to the financial condition of another. Of course one who knows the facts may testify as to solvency or insolvency. *Hard v. Brown*, 18 Vt. 87. But such conclusion cannot be based on mere hearsay. *Martin v. Meyer*, 112 Ala. 620 (20 South. Rep. 963). We need not set out all the rulings which offended against these principles. A few sample questions will suffice to show the errors of the trial court: "Q. Taking into consideration the business transaction you had with Ralen & Son, the terms of sale, the amount of sale, I wish you would state whether or not, in your opinion, Ralen & Co. had commercial standing entitling them to a credit of \$18.75." "Q. Now, taking into consideration the sale to them—the consignments providing that they should have all sold within a period of four months and return all unsold, the value of the consignment being \$18.75—considering the number of cans of baking powder, you may state whether these men at that particular time were entitled to consignment

upon credit." "Q. Examine Schedule A [the list of names], and state whether or not the contracts or orders of the parties for merchandise, and payment of money in sums not exceeding \$19.50 in any one instance, executed by parties or merchants whose names appear in Schedule A, possessed any value, and, if so, state fully what value they possessed during the months of June, July, and August, 1889." These questions were also erroneous in that they permitted the witnesses to usurp the functions of the jury; and the last one was clearly improper, and irrelevant to any of the issues in the case. It was not a question as to the value of the orders obtained by the plaintiff, but of defendant's good faith in refusing to accept them because they were from parties having a credit rating of less than \$500.

II. Under the instructions given by the trial court, plaintiff was not entitled to recover unless he showed in the aggregate one hundred orders, made up of orders
4. SALES: car
load lots:
burden of
proof. accepted by defendant, orders from parties having a rating of \$500 or over, and orders from parties having less than that rating, which were rejected by defendants in bad faith. This plaintiff failed to do. The burden was upon him, in view of the terms of the contract, to show bad faith of the defendant in refusing to accept orders, and this, we think, he failed to do. The evidence is undisputed that defendant in good faith attempted to find out the responsibility of those men who sent in orders whose rating was less than \$500, and that it rejected many of them because the parties were not entitled to credit. Plaintiff argues that defendant refused to fill the orders because it was unable to supply the goods, but this is not sustained by the record. Our conclusions as to the law of the case do not exactly accord with those of the trial court, as will be observed from what we have heretofore stated, but conceding, for the purposes of this opinion, that the

charge correctly gave the law, still there was error in overruling the motion for a new trial for two reasons: First, because plaintiff did not establish the acceptance or rejection of at least one hundred orders, which should have been accepted; and, second, because there was no sufficient evidence of bad faith on the part of the defendant in rejecting the orders. The contract was perfectly legal, and there were doubtless good reasons for reserving to defendant the right to accept the orders and to ship the goods. Plaintiff might have required a stipulation that defendant assign some good reason for not accepting the orders and shipping the goods, but he did not see fit to do so. Consequently he took the risk of satisfying defendant as to the propriety of accepting the orders, and so long as defendant acted in good faith plaintiff had no cause for complaint. A large discretion was necessarily vested in the defendant, for it was not only parting with its property, but also obligating itself to pay a commission on goods sold. In such a case the evidence as to bad faith should be sufficient not only to overcome the presumption of good motives and honest intent, but clearly show arbitrary and willful misconduct on defendant's part. The case must also be reversed because of errors in the admission of testimony.—REVERSED.

ADEL LEAGUE V. CLAUD EHMKE, Appellant.

Intoxicating Liquor: CIVIL DAMAGES: BURDEN OF PROOF. In an action by the wife for damages for the sale of liquor to her husband, where the seller relies as a defense on a compliance with the mulct law, he has the burden of alleging and proving such compliance.

Defense of Lawful Sale: SUBMISSION OF: WHEN NOT REQUIRED.

2 In an action for damages for the sale of liquor, where there is no evidence that defendant was lawfully selling under the mulct law, the court is not required to submit a defense made only by the pleadings, that defendant was operating under the law.

120 464
1125 408

120 464
130 108

Intoxication: HABIT OF DRINKING: INSTRUCTION. In an action
3 under Code, section 2418, an instruction that if defendant
caused or contributed to the habitual intoxication of plaintiff's
husband, and by reason thereof plaintiff was injured * * *
she is entitled to recover, but if defendant merely contributed
to the habit of drinking, without intoxication, but leading to
the habit which resulted in intoxication, she could not re-
cover, is proper, and recognizes the distinction between caus-
ing a habit and causing intoxication.

Habitual Intoxication: ALLEGATIONS: INSTRUCTION. An instruc-
4 tion authorizing recovery of damages by the wife, caused by
the husband's habitual intoxication to which defendant con-
tributed, is not erroneous, as being broader than the allega-
tions of a petition charging that defendant caused the habitual
intoxication of plaintiff's husband.

Sale to Habitual Drunkard: LIABILITY FOR. In an action for in-
5 jury caused by the sale of liquor to a habitual drunkard, an
instruction that if defendant caused or contributed to the con-
tinuance of the habit of becoming intoxicated, or being hab-
itually intoxicated he is liable so far as his acts contributed
thereto, is correct.

Damages: THREATS RESULTING FROM INTOXICATION: INSTRUCTION.
6 In an action by the wife for damages for the sale of liquor to
the husband, an instruction that if defendant contributed to
the husband's habitual intoxication of which the particular
intoxication at the time he threatened plaintiff with bodily in-
jury was a part, they might consider injury to plaintiff's health
resulting from such threats in estimating her damages, was
not error.

Prior Intoxication: ADMISSIBILITY OF EVIDENCE. In an action by
7 the wife for the sale of liquor to the husband, evidence of the
extent of the husband's drinking at a time long prior to that
covered by the action is immaterial.

Evidence: GENERAL CONDUCT: NON EXPERT TESTIMONY. Evidence
8 of the general conduct of plaintiff's husband during the period
covered by the action, and an opinion as to intoxication by a
nonexpert who details the facts, are properly admissible.

Appeal from Pottawattamie District Court.—HON. W. R.
GREEN, Judge.

MONDAY, MAY 18, 1903,

VOL. 120 IOWA.—80.

ACTION by a married woman to recover damages, both actual and exemplary, on account of injuries received by reason of the sale of intoxicating liquors by defendant to her husband. Verdict for plaintiff; and from judgment thereon, defendant appeals.—*Affirmed.*

A. L. Preston for appellant.

Willard & Willard and *T. S. Lewis* for appellee.

McCLAIN, J.—In presenting the issues to the jury the trial court did not instruct with reference to a defense interposed in the answer that defendant, at the time of the alleged sales to plaintiff's husband, was carrying on the business of selling liquor under the provisions of the mulct law, and the failure to present this defense to the jury is assigned as error. The civil liability provisions of the intoxicating liquor law were first enacted in 1862 as chapter 47, page 50, of the Acts of the Ninth General Assembly, and remained unchanged until the adoption of the present Code in 1897, being section 1557 of the Code of 1873. The commissioners who reported the present Code to the legislature made no modification in the section, save by way of the elimination of tautology, except to insert the provision as to giving, so that, as the section was reported, one who should give liquor to another, as well as one who should sell, would be liable in civil damages for injuries resulting therefrom. In adopting the Code, however, the legislature inserted the words "contrary to the provisions of this chapter," in the section as reported by the Code Commission, and as now found in section 2418 of the present Code. It is to be borne in mind that the so-called "mulct law," now embodied in sections 2432-2455 of the Code, was first enacted in 1894, as chapter 62, page 63, of the Acts of the Twenty Fifth General Assembly. In the case of *Carrier v. Bernstein*, 104 Iowa, 572, it was held that compliance with the mulct law on the part

of the seller of intoxicating liquor did not relieve him from civil liability for injuries to a wife in her means of support by reason of sale of liquors to her husband; the reason assigned being that if defendant, as alleged in the petition in that case, sold intoxicating liquor to plaintiff's husband, "causing him to become intoxicated, idle, profligate, and neglectful of his business, and so as to impair him in body and mind, and to render him unable to obtain remunerative employment, to the damage of plaintiff," he violated the conditions of the mulct law, and the fact that he was conducting his business in general under the mulct law would not constitute a defense. But this decision was made prior to the adoption of the present Code, and the change in the language of the civil liability section, to which we have already referred; and counsel for defendant now contends that the insertion by the legislature in the civil liability section of the words already quoted obviated the effect of this decision, so that one who complies with the provisions of the mulct law, as it is now in force, and does not sell to a minor, drunkard, or intoxicated person, or knowingly to any person who has taken any of the so-called "cures" for drunkenness (see Code, section 2448, paragraph 10), is not civilly liable for any

i. CIVIL damages: burden of proof. injury resulting to the wife of a person to whom such sales are made. But the difficulty with this argument, as applied to the present case, is that it does not appear that defendant was complying with the mulct law at the time of the sales made to plaintiff's husband. The seller who relies on compliance with the mulct law as a defense against any liability under the general provisions of the statute which prohibit the selling of liquors for use as a beverage has the burden of alleging and proving full and complete compliance with the conditions imposed by the mulct law. *Ritchie v. Zalesky*, 98 Iowa, 589; *State v. Van Vliet*, 92 Iowa, 476; *State v. Donahue*, 120 Iowa, 154.

In the present case defendant pleaded compliance with the mulct law as an affirmative defense, but by operation of law such allegations were denied without the

2. DEFENSE of lawful sale: submission of: when not required. filing of a reply by the plaintiff (Code, sections 3576, 3622, 3648), and therefore the burden of proving compliance with the mulct

law was upon the defendant. There was no evidence introduced by defendant of such compliance, except the general statement by him in his testimony as a witness that he was operating under the mulct law. But even if he was operating under the mulct law, the sale of liquor by him to plaintiff's husband would be unlawful, if not made in such place and in such manner and to such person as the mulct law authorizes. The defendant did not attempt to testify as a witness, nor is there any testimony to show that the provisions of the mulct law as to the place and manner of sale, and the person to whom sales were made, were such as were authorized. The court did not err, therefore, in failing to submit to the jury the question whether the sales of liquor to plaintiff's husband were lawful.

Complaint is made of an instruction in which the jury were told that if defendant caused or contributed to the habitual intoxication of plaintiff's husband, and that by reason thereof the plaintiff was injured in

3. INTOXICATION: habit of drinking: instruction. her means of support, defendant would be liable for actual and exemplary damages

thereby occasioned, while if the evidence merely showed that defendant contributed to the habit of drinking on the part of plaintiff's husband without intoxication, but leading to the habit of drinking, which resulted in the intoxication, then the defendant would not be liable. It is urged that to cause or contribute to an habitual condition of intoxication does not give rise to any liability, but we think this view is erroneous. The section of the Code already referred to as furnishing the basis for this action

expressly provides that a wife who shall be injured in her means of support in consequence of the intoxication of her husband, habitual or otherwise, caused by the defendant, shall have a right of recovery. It is plain that her action is not limited to the recovery of damages resulting from habitual intoxication. The distinction made in the cases to which counsel for appellant refers is between causing or contributing to a habit of drinking, which ultimately results in an habitual intoxication not directly caused by liquor sold by the defendant, and the causing of such habitual intoxication itself. *Ennis v. Shiley*, 47 Iowa, 552; *Cox v. Newkirk*, 73 Iowa, 42; *Arnold v. Barkalow*, 73 Iowa, 183. This distinction was clearly presented to the jury in the instructions given in this case.

As to the claim that the instruction is broader than the allegations of the petition, in that it allows recovery by plaintiff for damages caused by habitual intoxication to which defendant contributed, while the petition alleges only that defendant caused habitual intoxication, it is sufficient to say that it is without merit. One who contributes to an injury in such a way as to render himself liable therefor to that extent causes the injury complained of. That the liquor seller, who by sales of liquor contributes to such an injury, is liable therefor to the extent to which his sales caused the injuries, is well settled. *Woolheather v. Risley*, 38 Iowa, 486; *Ennis v. Shiley*, 47 Iowa, 552; *Welch v. Jugenheimor*, 56 Iowa, 11.

Complaint is made of an instruction as to the measure of damages, and it is urged that plaintiff was not entitled to recover if, prior to the sale of liquor to her husband by defendant, he was already in a condition of habitual intoxication, and on that account was not furnishing her any support whatever. It may be true that if, from other causes

4. HABITUAL
intoxication:
allegations:
instruction.

5. SALE to
habitual
drunkard;
liability for.

than his habitual intoxication, he was not furnishing plaintiff any support, a subsequent condition of habitual intoxication, caused by defendant, would not entitle her to recover in general the support from her husband to which she was entitled. *Bellison v. Apland*, 115 Iowa, 599. But if the prior failure to furnish support was due to habitual intoxication, and this condition was caused to continue by sales of liquor by defendant, then plaintiff is entitled to recover. A condition of habitual intoxication does not continue without such continuance is caused or contributed to by further sales of liquor; and if the only reason why plaintiff's husband did not furnish her support was a condition of habitual intoxication, then plaintiff may recover the damages resulting from the continuance of this condition by reason of defendant's acts. And this is what the jury were told by the instructions. It appears that until plaintiff's husband formed the habit of becoming intoxicated he provided fully and satisfactorily for the support of his wife, and the jury were justified in finding that he would have done so during the time covered by this action, had not this habit of intoxication been continued by reason of the sales to him of intoxicating liquor. Therefore, if defendant caused or contributed to the continuance of the habit of becoming intoxicated, or being habitually intoxicated, he is liable so far as his acts caused or contributed to the injury. *Woolheather v. Risley*, 38 Iowa, 486; *Huff v. Aultman*, 69 Iowa, 71. If the defendant claimed that other causes than that of habitual intoxication had interfered with the ability of plaintiff's husband to support her, he could have had the jury's attention specially directed to such matters by an additional instruction, had he asked it, but no such instruction was asked.

Another assignment of error is based on an instruction allowing the jury to take into consideration, in measuring plaintiff's damages, injury to plaintiff's health resulting from threats of great bodily injury made to her, or in her

presence to their children, by her husband while in an intoxicated condition. It is urged that, in the absence of evidence that the particular fit of intoxication during which these threats were made was caused or contributed to by defendant, then defendant would not be liable for this injury. But under the instruction given the jury was not to take into account this element of damage unless it should find that defendant contributed to a state of habitual intoxication of which the particular intoxication at the time was a part. We think there was no error in this portion of the charge. If a state of habitual intoxication existed, caused or contributed to by defendant, then certainly acts of violence on the part of plaintiff's husband, due to such habitual intoxication, and resulting from a particular fit of intoxication, which was a part of it, would be chargeable to defendant, to the extent to which he had contributed to such habitual condition. It would not do to say that defendant could cause or contribute to a condition of habitual intoxication, and at the same time escape any liability for the specific acts at a particular time caused thereby, merely because the fit of intoxication during which the acts were done was the immediate result of liquor procured from some other person.

We need not discuss at length other assignments, such as that the verdict was without support in the evidence, that the damages allowed were excessive, and that the verdict was the result of passion and prejudice. An examination of the record does not sustain these assignments. As to an assignment of alleged error in admitting testimony as to the extent of the husband's drinking at a time long prior to the period covered by this action, it is sufficient to say that the objection sustained on the ground that such evidence was irrelevant and immaterial, was well taken. It does not follow, because the husband was a hard drinker at a

6. DAMAGES:
threats re-
sulting from
intoxication:
instruction.

7. PRIOR intox-
ication: ad-
missibility of
evidence of.

previous time, that he would have continued to be a hard drinker at the time covered by this action if defendant had not sold him liquor. And as already pointed out, the fact that by reason of habitual intoxication he had failed in former years to furnish proper support to the plaintiff would not defeat recovery by plaintiff for his failure to furnish support by reason of habitual intoxication induced by defendant's sales.

Objections to questions propounded to witnesses for plaintiff as to the general condition of plaintiff's husband with reference to intoxication during the period covered by this action, and as to threats of personal violence towards his children in the presence of plaintiff, were properly overruled. An opinion as to an intoxicated condition may be given by one not an expert who details the facts, and, as already indicated, violent conduct resulting from habitual intoxication, so far as it was likely to affect the plaintiff, might properly be shown.

We have considered all the material assignments of error, and, finding them to be without merit, the judgment of the trial court is **AFFIRMED**.

G. S. KRINGLE v. JULIA RHOMBERG, O. G. KRINGLE,
Appellant, *et al.*

Resulting Trust: PAROLE EVIDENCE TO ESTABLISH: Were the title

- 1 to real property purchased in a partnership transaction is taken in the name of one of the partners, there is a resulting trust in favor of the partnership which may be shown by parol, so that the same may be charged with the interest of the partnership.

Conveyance by Trustee: BONA FIDE PURCHASER: Where a trustee

- 2 conveys property in violation of the trust, the grantee will acquire no title unless he is a purchaser for value without notice of the trust.

Parties: SUBSTITUTION OF. Where a party to an action makes an assignment, it is not necessary to substitute the assignee, nor has the other party a right to insist on such substitution.

Appeal from Dubuque District Court.—HON. M. C. MATTHEWS, Judge.

THURSDAY, MAY 19, 1903.

ACTION for partition of two certain parcels of real property, in which plaintiff claims an undivided half interest by conveyance from defendants O. G. Kringle and Ellen M. Kringle, his wife; alleging that the other undivided half is the property of defendant Julia Rhomberg. D. Rhomberg is made defendant as the husband of Julia Rhomberg; also as claiming some interest under a deed executed by O. G. Kringle to him as trustee. The defendants Julia Rhomberg and D. Rhomberg deny the title of plaintiff, alleging that the conveyance to him by O. G. Kringle was without consideration, and was executed and accepted with the fraudulent purpose of defeating the claims of creditors, and especially the claim of one Maria Kunz for about \$1,250, unpaid purchase money; and they ask that plaintiff's petition be dismissed as to them, and that O. G. Kringle and his wife, Ellen M. Kringle, and Maria Kunz be made parties defendant. Maria Kunz, having been made party defendant, filed a cross-petition against plaintiff and O. G. Kringle and wife, alleging that the firm of Walker & Rhomberg advanced the purchase price of the parcels of real property described in plaintiff's petition, which real property was purchased in partnership by the firm of Walker & Rhomberg and O. G. Kringle, and that Walker & Rhomberg were to have a lien thereon for such purchase price and advances made by them on account of the holding and selling of such property, and that the proceeds, after repayment to them of the purchase price and advances, should be divided equally between said firm

and said O. G. Kringle. Maria Kunz further alleged that the claim of said Walker & Rhomberg for purchase price and advances had been assigned to her as security for a claim of \$10,000 which she held against said firm, and that the conveyance of O. G. Kringle and wife to plaintiff was fraudulent, and asked that she have judgment against O. G. Kringle for the amount due from him to Walker & Rhomberg on account of purchase money and advances, and that the claim be declared a lien on the premises. To this cross-petition O. G. Kringle pleaded the statute of limitations and a discharge in bankruptcy, and Maria Kunz replied that the claim arose out of fraud, and was not discharged by the bankruptcy proceeding. In the decree the court affirmed the shares of plaintiff and Julia Rhomberg, as set out in plaintiff's petition, and ordered partition accordingly, and on the cross-petition rendered judgment in favor of Maria Kunz against O. G. Kringle for \$1,645. O. G. Kringle appeals from the judgment against him on the cross-petition. Julia Rhomberg, D. Rhomberg, and Maria Kunz appeal from the decree so far as it is in favor of plaintiff—*Reversed*.

R. W. Stewart and P. S. Webster for appellants O. G. Kringle, Ellen M. Kringle, and G. S. Kringle.

McCarthy, Kenline & Roedell for Marie Kunz, Julia Rhomberg, and D. Rhomberg.

McCLAIN, J.—From the foregoing statement, it is evident that the issues in this case are various and complex; but in truth the statement is very inadequate as a presentation of the pleadings, the abstract of which covers twenty-two printed pages. Many questions of controversy appear in the record and arguments of counsel, not in any way suggested by this brief outline, but necessarily involved in determining the correctness of the decree.

This much is said, not by way of complaint, but in explanation of the difficulty we experience in stating the grounds on which our conclusions are based, and especially by way of explanation of the anomaly of a decree in partition proceedings awarding a judgment in favor of one who was not a party to the original proceeding, against another who not only was not an original party, but does not claim any interest whatever in the property to be partitioned, which judgment is not made a lien on the property, or any interest in it, but is purely personal and based on fraud; and this anomalous result has been reached notwithstanding the provisions of Code, section 4240, which seems to have been designed to prevent the joinder of another cause of action, or the interposition by way of counterclaim of any claim for the recovery of a personal judgment in a partition proceeding. If the rules of pleading had been adhered to in this case, the issues would have been much simpler and more intelligible, not only to this court, but probably to the trial court. However, no objection was made in the court below to misjoinder or improper interposition of a new cause of action by counterclaim or cross-petition until the close of the evidence, and therefore, if there was any cause of complaint on any such ground, the objection was made too late.

There seems to be no dispute as to the fact that plaintiff had, when the decree was rendered, the legal or apparent title by conveyance from O. G. and E. M. Kringle to an undivided half interest in the premises described in his petition; and in considering the correctness of the decree, so far as it confirmed the interest claimed by him, it will only be necessary to notice the objections made to his title. We shall indicate but briefly our conclusions, realizing that those not familiar with the record will feel but slight interest in the details of the case, and that the parties directly interested will appreciate the bearing of our conclusions without elaborate explanation.

In pursuance of some partnership arrangement between O. G. Kringle and the firm of Walker & Rhomberg, the two tracts of land situated in the city of Dubuque, described in plaintiff's petition, were acquired in 1891 by distinct transactions; title to one being taken in the name of O. G. Kringle, and title to the other in that of Julia Rhomberg. One tract may be called the "Sullivan Tract," afterwards known as "Rose Hill Addition"; the other, the "Tibey Lots" or the "Quarry." On April 3, 1893, O. G. Kringle executed to D. Rhomberg, trustee, a warranty deed for an undivided half interest in the entire property, but on August 26, 1893, with D. Rhomberg and one Tschirgi, he executed a declaration that this deed was made to secure Tschirgi on account of a joint indebtedness of himself and Tschirgi to Walker & Rhomberg, for which Tschirgi had mortgaged his own property. A deed of D. Rhomberg, trustee, and D. Rhomberg and Julia Rhomberg in their own right to O. G. Kringle, executed May 14, 1896, purports to be a correction of this trust deed of April 3, 1893, so as to protect O. G. Kringle and his wife against any liability under the trust deed for certain mineral rights in the property, which had been reserved in the original conveyance of the Sullivan tract, and also to relieve them from liability under such conveyance for back taxes. On January 22, 1898, Julia Rhomberg and D. Rhomberg executed to Ellen M. Kringle a quit claim deed to an undivided one-half of the entire property described in the plaintiff's petition, with the recital that such deed was given in lieu of a former deed which had been lost; and D. Rhomberg, in his testimony, explains this transaction as intended simply to make good the title of O. G. Kringle and wife to an undivided one-half interest in the Tibey lots, which had been included with the other property in the trust deed to D. Rhomberg, without any legal title having been in Kringle at that time. This explanation seems to be satisfactory and uncontroverted. While

it is true that this conveyance was to Ellen M. Kringle instead of to O. G. Kringle, it appears that at this time O. G. Kringle was insolvent and heavily indebted, and was doing business in his wife's name; and, no doubt, it was thought to be necessary to thus protect her against liability. There was no consideration proceeding from Ellen M. Kringle for this conveyance. On May 20, 1899, Tschirgi released to O. G. Kringle all his interest under the trust deed of April 3, 1893, and the declaration of the purpose thereof made August 26, 1893, as already explained. It has been necessary to refer to this trust deed and the other instruments relating to the same transaction to clear the case of confusion resulting from their injection into the record. If we are correct in our conclusions, these instruments have no bearing on the rights of the parties to the present controversy, and no further reference will be made to them.

The first transaction of significance in the case, after the acquisition of the title to the premises in 1891—the conveyance to the Sullivan tract being taken in the name of O. G. Kringle, and that of the Tibey lots in the name of Julia Rhomberg, as already stated—was a warranty deed on November 13, 1893, by O. G. Kringle and wife to Julia Rhomberg, conveying an undivided one-half of Rose Hill addition, which conveyance was on December 27, 1893, corrected by a quit claim deed by the same grantors to the same grantee. As the trust of April 3, 1893, to D. Rhomberg for an undivided half had previously been executed, it may, perhaps, have been the intention in making this conveyance to place the balance of O. G. Kringle's apparent interest in Rose Hill addition in Julia Rhomberg, who already had title to the Tibey lots, and thus practically wind up any partnership relation existing between Walker & Rhomberg and O. G. Kringle. That this was the intention seems to be indicated by an instrument executed on December 28, 1893, in which O. G. Kringle

acknowledges that Walker & Rhomberg had fully settled with him for all real estate he theretofore owned in partnership with them, agreeing to execute quitclaim deeds to any and all such pieces, whenever asked for by said Walker & Rhomberg, for any equity he might have theretofore had in the pieces owned by them in common and undivided, "and which now stand in the names of D. Rhomberg, J. Rhomberg, Julia Rhomberg," etc., "of record." On the same date, in an instrument executed by Walker & Rhomberg, it is recited that "in settlement of the purchase price of the real estate sold by O. G. Kringle to D. Rhomberg and J. Rhomberg," etc., "he, the said Kringle, is to get his account with Walker & Rhomberg balanced, including his liability in the account of Tschirgi and Kringle to Walker & Rhomberg." It appears that this last instrument was the one produced by O. G. Kringle to Tschirgi in order to secure the satisfaction by Tschirgi of the trust deed made for his benefit to D. Rhomberg on April 3, 1893. We have not noticed the contradiction in the evidence as to the source from which the money was derived with which the property was originally bought, and we need not decide whether the entire purchase price was advanced by Walker & Rhomberg under an agreement that Kringle should have a one-half interest in the profits after the entire purchase price and other advances by Walker & Rhomberg were satisfied, with interest, or whether O. G. Kringle paid Walker & Rhomberg at the time one-half the purchase price, and thereby became the real owner of a one-half interest, subject only to liability for advances subsequently made by Walker & Rhomberg in caring for the property. It is unnecessary to cite authorities in support of the proposition that, where title to real property purchased in a partnership transaction is

1. RESULTING trust: parol evidence to establish.

taken in the name of one of the partners, there is a resulting trust in favor of the partnership, which may be established by parol

evidence, so that the title in the one partner may be charged with the interest of the partnership. If Walker & Rhomberg advanced the entire purchase price, then O. G. Kringle had no interest, save in the proceeds after the purchase price and advances were satisfied. If O. G. Kringle paid one-half the purchase price, then his beneficial interest must have been exhausted in satisfaction of the joint debt which he and Tschirgi owed to Walker & Rhomberg. We cannot believe, under the evidence, that he had any beneficial interest after the settlement of December 28, 1898. After that date he was a naked trustee, with no interest which he could convey in his own right.

When, therefore, on April 17, 1899, O. G. Kringle and wife attempted to convey an undivided half interest in all this property to the plaintiff, G. S. Kringle, in violation of the trust, no title passed, unless plaintiff was a purchaser for value, without notice. Plaintiff was the brother of O. G. Kringle, and there is evidence tending to show that he had no means with which he could have paid the \$500 recited as the consideration for the deed. But regardless of this evidence, plaintiff does not show that he actually paid any consideration, nor that, having paid a consideration, he took the property without notice of the trust. We reach the conclusion that plaintiff did not acquire an undivided half interest, or any other interest, and that the decree of the lower court, establishing an interest in him and directing a partition of the property, was erroneous.

The judgment in the lower court in favor of Maria Kunz against O. G. Kringle was based on the theory that the latter had, by his wrongful act in conveying an undivided interest in the property to plaintiff, put said property beyond the reach of Maria Kunz, who had by assignment acquired all the rights of Walker & Rhomberg, D. Rhomberg, trustee, and Julia Rhomberg in this prop-

2. CONVEYANCE
by trustee:
bona fide
purchaser.

erty. As we have reached the conclusion that plaintiff acquired no interest in the property by the attempted transfer from O. G. Kringle and wife, there is no basis for this judgment; and in that respect, also, the decree is reversed.

A motion by O. G. Kringle, appellant, to strike from appellee's additional abstract a portion thereof which refers to an application in the lower court, made after judgment and before appeal, to substitute
1 PARTIES:
substitution
of. Ellen M. Kringle as plaintiff, on the ground that plaintiff had, after judgment, made a conveyance of the interest declared to be in him by the decree to said Ellen M. Kringle, is submitted with the case. It is not necessary to have the assignee substituted in case of an assignment pending litigation, nor has the opposite party the right to insist on such substitution. *Kreuger v. Sylvester*, 100 Iowa, 647; *Emerson v. Miller*, 115 Iowa, 315. It is urged that this motion for substitution is really in the nature of a supplemental pleading. But it is not so denominated, and we see no reason for granting the relief asked in this respect.

The motion to strike the matter from appellee's amended abstract is sustained, without costs. A decree may be entered in this court in accordance with the foregoing opinion, if any of the parties so elect. Otherwise the case will be remanded to the lower court for such decree.—REVERSED.

CARL W. STANLEY, Trustee, Appellee, v. E. A. SOUTHWICK, Appellant, AND PRENTIS CLARK, F. M. WIDNER *et al.*, Appellees.

Conversion: SALE OF GOODS: ACTION BY MORTGAGEES. The owner of a stock of goods, after executing mortgages thereon, gave a bill of sale to another who went into possession, and thereafter the owner was declared a bankrupt. On demand, the pur-

chaser refused to deliver the goods to the mortgagees until he could consult an attorney, but the next day made a formal tender and requested that a time be fixed for an accounting of goods sold. *Held*, in a suit by the trustee in bankruptcy against the purchaser and mortgagees to recover the goods, in which it was determined that both the mortgages and bill of sale were void, it was error to render judgment on a cross-petition of the mortgagees against the purchaser for conversion.

Appeal from Adams District Court.—HON. H. M. TOWNER,
Judge.

TUESDAY, MAY 19, 1908.

THE correct title of this cause is given in the caption above. By inadvertence and error on the part of counsel for appellant, the title of the cause as printed on the abstract was given as "E. A. Southwick, Appellant, v. F. M. Widner et al., Appellees," and the cause was so docketed. The record is now ordered changed to correspond with the corrected title as given above.

It appears that on and prior to March 24, 1899, C. W. Harlow, one of the defendants, was the owner of a general stock of merchandise situated in the town of Carl, Adams county. On that day he executed and delivered to the defendants F. M. Widner and A. B. Turner a chattel mortgage covering said stock of merchandise to secure a debt then due to Widner in the sum of \$1,200 and a debt then due to Turner in the sum of \$800. Before the commencement of this action, Turner assigned his interest in said mortgage to the defendant Prentis Clark. Said mortgage was made a matter of record on the day of its execution. Thereafter, and on the same day, said Harlow, being indebted to the defendant Southwick, executed and delivered to him a bill of sale of said stock of merchandise, under which Southwick at once took possession, and thereafter proceeded to sell therefrom in the usual course of business at retail. It appears that this was with the

knowledge and consent of Widner and Clark. In May, 1899, the said Harlow was adjudged an involuntary bankrupt in proceedings brought for that purpose in the district Court of the United States; and on May 18, 1899, the plaintiff in this action was appointed and qualified as trustee of the estate of said Harlow. On May 29th plaintiff, as such trustee, made demand upon Southwick for the possession of the merchandise in question, but such demand was not then complied with. In June following, Widner and Clark, mortgagees, made demand upon Southwick for the merchandise. What followed such demand is a subject of dispute. Southwick claims that he offered to turn the unsold property over, and to account for the portion sold, but all to be subject to the bankruptcy proceedings, which offer was refused. Widner and Clark contend that their demand was refused without qualification. Be this as it may, it is undisputed that on the day following, Southwick, after having consulted his attorneys, made formal tender in writing of the merchandise to Widner and Clark, and requested that a time and place be fixed at which an accounting might be had concerning the goods sold, and offering to pay the value thereof. This tender was refused, and no accounting appears to have been had. This action in equity was commenced in July, and, after alleging the facts substantially set forth above, it is said in the petition that at the time said mortgage and bill of sale were executed the said Harlow was insolvent; that said transfers were intended as preferences, in violation of the bankrupt law. A decree is prayed adjudging such transfers to be void, and for cancelation thereof, and that plaintiff have possession as against all defendants; further, that an accounting be had as against defendant Southwick. A receiver was also prayed for and appointed, and to him possession of the property was at once delivered by Southwick. The answers of the defendants Widner and Clark put in issue the allegations of insolvency and preference,

and each file a cross-petition as against the defendant Southwick, alleging conversion of the stock of merchandise by him, and demanding judgment in favor of Widner in the sum of \$1,200 and interest, and in favor of Clark in the sum of \$800 and interest. Defendant Southwick answers the petition of plaintiff, alleging that he has at all times been willing to turn over the property and make an accounting as soon as advised of the proper parties entitled thereto. In answer to the cross-petition, he denies conversion, and, as in his answer to the petition of plaintiff, alleges that he has at all times been ready and willing to account to the party entitled thereto, sets up the bankruptcy proceedings, and says that the plaintiff, trustee, has at all times claimed to be entitled to the property, and that he has delivered such property to him, and offered to account to him for all goods sold. Trial was had to the court, resulting in a decree dated and entered on March 4, 1901, finding the equities in favor of plaintiff; further finding the sum of \$894.40 to be due plaintiff from defendant Southwick on account of goods sold by him, and rendering judgment therefor; further finding that plaintiff is entitled to the property in the hands of the receiver, and directing the same to be delivered accordingly. On the same day the court made and entered a further and separate decree having reference to the issues joined upon the cross-petition, in which decree it is found that defendant Southwick had converted the mortgaged goods of defendant Widner of the value of \$1,200, for which sum, with interest, amounting in all to \$1,320, judgment is rendered in favor of Widner against Southwick; further finding that Southwick had converted mortgaged goods belonging to Clark of the value of \$800, for which sum, with interest, amounting in all to \$880, judgment is rendered in favor of Clark against Southwick. Southwick alone appeals.—*Affirmed in part: Reversed in part.*

D. W. Church for appellant.

W. O. Mitchell for appellee Stanley.

Davis & Wells and *Maxwell & Maxwell* for appellees Widner and Clark.

BISHOP, C. J.—The appellant makes no complaint concerning the decree of the trial court rendered in favor of the plaintiff, trustee. As defendants Clark and Widner do not appeal, that decree must be held to be conclusive as against them. The complaint of appellant is directed to the decree in favor of Clark and Widner, and he says that thereby he is not only required to pay a second time for all goods sold by him, but also to pay the full value of the goods turned over by him to the receiver. By the decree in favor of plaintiff, the mortgage to Widner and Clark and the bill of sale to Southwick were in substance and effect held void and canceled, as in violation of the provisions of the bankruptcy act. Accordingly it was thereby established that the trustee at the time of his demand in May, 1899, was entitled to have possession of the goods surrendered to him, and this against both Southwick and Widner and Clark. Now, at the time of their alleged demand, and strictly as a matter of law, it may be that as to Southwick alone Widner and Clark were entitled to possession, and, were it not for the bankruptcy proceedings and the demands of the trustee, a refusal on the part of Southwick to deliver possession would amount to a complete conversion, and give rise to an action in their favor for the full value of the property, or at least to the extent of the indebtedness due them. But this is an action in equity. It appears that the trustee was claiming the goods, and it is clear that, when confronted by the demand of Widner and Clark, Southwick was in doubt as to his rights and duties in the premises, and he

refused to act until advised by his attorneys; that on the next day he made full tender, which was refused. Taking all the circumstances into consideration, nothing more than a technical conversion can be claimed from his refusal to deliver possession the moment demand was made upon him by Clark and Widner; that any prejudice or damage resulted to them therefrom is not even suggested in the record. We think the trial court must have inadvertently signed the decree complained of, because it would be unjust and unconscionable to attach such serious consequences by a decree in equity to an act which at best was a mere technical legal conversion. We agree, therefore, that the decree in favor of plaintiff shall stand affirmed, while the decree in favor of the cross-petitioners, Widner and Clark, is reversed. The costs of this appeal will be taxed to said Widner and Clark jointly.—AFFIRMED in part; REVERSED in part.

120	485
135	143

ELLA WINEGARDNER, Appellee, v. EQUITABLE LOAN COMPANY, JOHN W. WINEGARDNER, AND KNOXVILLE NATIONAL BANK, Defendants, AND O. D. KESTER, Cross Petitioner, Defendant.

Building and Loan Association: ISSUANCE OF GUARANTEED STOCK:

- 1 **POWER OF ASSOCIATION.** Where a building and loan association issues its stock on an agreement that it will mature in a specified time, and guarantees that if there is not then sufficient money to its credit the deficiency will be paid out of its guaranty fund, consisting of money derived from the sale of other stock and from stock payments, the same constitutes a preferential contract not within the power of a building and loan association, and a company entering into it is not entitled to the benefit of the statutes relating to such associations.

Estoppel. The fact that a holder of preferred stock of a building
2 and loan association, on which she obtained a loan, has made repayments to the amount of such loan will not estop her from asserting the invalidity of the contract.

Preferred Stock: LEGALIZING ACT. Chapter 48 of the Acts of the 27th General Assembly legalizing the system of premiums, fees and fines exacted by building and loan associations has no application to the issuance of preferred stock.

Appeal from Marion District Court.—HON. A. W. WILKINSON, Judge.

TUESDAY, MAY 19, 1903.

ACTION in equity to cancel a mortgage made by plaintiff to the Equitable Loan Company, and assigned to O. D. Kester. Decree as prayed, and Kester appeals.—*Affirmed.*

G. K. Hart and McNett & Tisdale for appellant.

W. S. Bilby and Crozier & McCormick for appellee.

WEAVER, J.—Under the date of April 1, 1895, plaintiff subscribed for three shares, of \$500 each, in the Equitable Loan Company, a corporation organized in this state, and received a certificate reciting, among other things, that in consideration of a sum of \$6 per month to be paid until the maturity of the shares, estimated to require only one hundred and eight months, the company would pay the holder \$1,500 on surrender of the stock. To this promise was added the following: "Provided, however it is expressly agreed between this company and said stockholder, that when these shares are one hundred and twenty months old and one hundred and twenty payments of six dollars each have been made thereon, these shares shall be matured and if at that time the money to the credit of these shares does not amount to \$1,500.00 the deficit shall be paid out of the guarantee fund, or any money belonging to the guarantee stock issued by this company." On the same date plaintiff received from said defendant \$1,500, the repayment of which she secured in the following manner: (1) by a note as follows: "\$1,606.50.

Ottumwa, Iowa, April 1, 1895. For value received we promise to pay to the order of the Equitable Loan Company of Ottumwa, Iowa, at its treasurer's office in Ottumwa, Iowa, sixteen hundred and six and fifty one hundredths dollars as follows: The sum of thirteen and fifty one hundredths dollars on the fifth day of each and every month for the full period of one hundred and nineteen months commencing April 5, 1895. Said monthly payments consisting of the following items: Six and no hundredths dollars monthly dues on capital stock of said company evidenced by certificate No. 683 this day pledged by me to said company to secure this loan and seven and fifty one hundredths dollars the same being monthly interest due on loan, and further agree in case of default in monthly payments of said sums of money or any part thereof at the times and according to the terms of this obligation to pay fines and penalties assessed against us by the said company on the account thereof in accordance with its by-laws and rules or any of the by-laws and rules that may hereafter be passed or established, and in case of default, if the stock pledged, the security given to secure said sums of money and said monthly payments, shall upon the foreclosure and sale thereof be insufficient to pay said company in full, we promise and agree to fully pay and discharge the same. Ella Winegardner." (2) By another note, for \$892.50; being, as therein stated, the sum of \$7.50 per month for the full period of one hundred and nineteen months for premium bid for the right of precedence in receiving the loan. (3) By another note, for \$1,500, payable six years after date, with six per cent. interest, payable semi-annually. (4) By a "mortgage deed" of certain real estate, securing the payment of the \$1,500 note above mentioned. And (5) by a mortgage on the same property, securing the other two notes above described, and reciting that it is made subordinate to the \$1,500 lien.

Prior to May, 1900, plaintiff had paid upon the contract evidenced by the foregoing obligations the aggregate amount of about \$1,275, and, desiring to make payment in full, tendered the company the sum of \$502.50, as the unpaid balance; and, the tender being refused, this action was begun. In addition to the foregoing, she alleges that the contract of loan was usurious, that there was in fact no bidding for precedence in obtaining the loan, but said so-called premium was arbitrarily fixed and inserted in the contract as a pretext to conceal the real character of the transaction. She further asserts that the shares of capital stock issued to her were of a class known as "A" stock, which by its terms gives preference to its holders over the holders of other stock, and by reason of such preference they are void and worthless, and afford no consideration for the obligations given by her. She further alleges that in May, 1900, the company failed in business, went into liquidation, and failed and refused to carry out its contract. The answer of the Equitable Loan Company admits the loan and the making of the several instruments already described, and admits that the stock issued to the plaintiff provided for preference over the holders of other stock. It alleges that after giving plaintiff due credit for all her payments, and value of her stock, there is still due a balance of \$1,258.57, for which amount it asks a foreclosure of its mortgage. Thereafter the appellant filed a pleading alleging that the Equitable Loan Company had gone into liquidation, and that in winding up its affairs he became the purchaser, and is now the owner of the notes and mortgage in suit. He adopts the allegations and claims made herein by the company, and alleges that plaintiff, by accepting the certificate of stock and making payments thereon, is estopped to deny its validity. Other matters are pleaded by the parties, but the foregoing embodies all that is essential upon this appeal.

There is no controversy but that the stock issued to plaintiff, by which full payment was guarantied at a fixed time, was part of a limited class which was issued in the earlier history of the company; but, this plan of business having been disapproved by the executive council, the practice was later abandoned. It is also conceded or conclusively shown that plaintiff has paid upon the various installments required of her, pursuant to the several obligations given the company, the sum of \$1,260, and a membership fee of \$15, and that she has since made the tender of \$502.50, as pleaded. There is no claim that there was any competitive bidding in awarding the loan to the plaintiff, but a subsequent legalizing act by the legislature is relied upon to avoid any plea of usury based on such omission.

I. The appellant's claim of right to enforce a performance of plaintiff's contract according to its terms rests upon the proposition that the transaction is within the protection of the statute relating to building and loan associations. To be entitled to this protection, it must appear that the corporation was an association of that character, and that the contract which it seeks to enforce is of a kind which it was authorized to make. As an alleged building and loan corporation, it is claiming to exercise rights and privileges which are denied to corporations and individuals generally; and, to obtain judicial recognition of these exemptions or exceptions from the general rule, it must bring itself and its contract within the terms and conditions which are precedent to the exercise of the exceptional privilege. For the present, we will assume that the Equitable Loan Company was in its lifetime a building and loan association. It is unnecessary for us here to go into any dissertation upon the general scope and nature of these enterprises. It is sufficient for present purposes to say that the fundamental idea upon which the whole struc-

1. ISSUANCE
of guaranteed
stock: power
of association.

ture has been erected is that of mutual profit sharing by all members, whether borrowers or nonborrowers. Such an organization has and can have no "capital," in the ordinary sense of that word, except the contributions made from time to time by its shareholders; thus constituting a fund to be loaned or advanced to members desiring the same, and presenting the requisite security. No share of stock in such association can be worth more at any time than the sum of the installments which have been paid thereon increased by its proportionate part of the profits earned. In other words, no share can ever be legitimately "matured" until the aggregate of such payments and earnings is equal to its par value. When that time comes, the stock is retired by operation of law, and the holder ceases to be a member, and becomes a creditor of the corporation for the face value of his certificate. In the very nature of things, it is impossible for the corporation, its officers or agents, to know in advance the precise date when stock may be matured; and if an issue is made upon an agreement to pay or redeem it at par at a date certain, and the earnings prove insufficient to make good the contract, one of two results must follow: The corporation must confess its insolvency, or by some scheme or device cast the loss upon the remaining holders of its stock; thereby reducing their profits and postponing the maturity of their own shares. A transaction which leads to such results is certainly not within the spirit or intent of the law which authorizes the existence of these associations.

We come, then, to the inquiry whether the transaction between plaintiff and the Equitable Loan Company is open to the objections here considered. By the terms of the certificate, it is first agreed that at maturity, estimated to require only one hundred and eight months, the corporation will pay the certificate holder the full sum of \$1,500. It then provides that one hundred and twenty months shall be the extreme limit of the time for maturity, and,

if at such date the "credits" upon the stock are insufficient for payment in full, the deficit is to be made up from the guaranty fund. That this agreement gives, or attempts to give, the holder of the stock thus issued "a preference over the holders of other stock in the company," is very clear, and is expressly admitted in the pleadings. It is true, as contended by appellant, that at the date of this contract there was no provision in our statutes expressly forbidding or expressly authorizing the issuance of stock with a "guaranty" or definite payment feature. Indeed, at that time the necessity and propriety of strict and definite statutory regulation of this business had not appealed to the legislature, and the provisions then existing for that purpose were exceedingly meager and indefinite. But building and loan enterprises had for many years been carried on in this and other states, and their status, character, and limitations were already reasonably well settled by the courts. In the absence of express statutory regulations, we think a corporation organized to do a building and loan business would therefore be restricted and controlled by the principles and rules which have obtained general judicial approval. The question presented in this case is not to be disposed of by reference to the law which permits ordinary corporations to issue "preferred stock." While both classes of corporations may be organized under the same general chapter of the Code, the nature of their business, the powers conferred, and the ends to be attained are so radically different that argument by analogy is apt to be misleading. Preferred stock, generally speaking, is an issue of shares upon which a stated dividend from the corporate profits is to be paid before any distribution is made to the holders of common stock. If there be no profits, there is no dividend to either class. If the profits be small, the preferred stock may absorb them all; but, if great, the preferred stock receives no more than the stipulated dividend, and the common stock may prove the more profitable. This

plan, which is entirely compatible with an ordinary business undertaking, is essentially destructive of that "mutuality, reciprocity, and equality" which is so often declared to be the controlling idea of the building and loan business.

But the scheme of a "guaranty fund" adopted in the present instance is based on no plan for the distribution of profits. As disclosed by the evidence, that fund was created by setting apart a definite portion of each and every installment paid by members upon their stock subscriptions. It was further supposed to be strengthened by holding in reserve the entire proceeds of the sale of another class of stock, known as "guaranty stock," to be applied to the same purpose if necessary. It is manifest that such a fund represents no profits whatever, but is in fact a part of the principal invested by the shareholders generally; and the process of thus "maturing" shares does not differ in principle from one by which, when the agreed date of maturing a guarantied share arrives, and the profits are insufficient to pay in full, the deficit is assessed or levied upon the entire membership. By this scheme, even though there were not a dollar of profit earned (a result which recent history shows is by no means impossible), yet the preferred holder of a guarantied share at the end of one hundred and twenty months would withdraw his entire investment of \$240, with an "unearned increment" of \$260, taken directly from the pockets of his fellow members. Surely the legislature could not have believed or understood that business of this kind was included within the powers granted to building and loan associations, and if, in the stress of competition for business, an association assumes to enter into a contract so foreign to the idea which the law is intended to promote, sound public policy forbids that it be allowed to claim therefor the peculiar privileges and immunities which have been granted for the protection and encouragement of business within the legitimate scope of their

organization. It is no answer to these objections to say, as is suggested by counsel, that, while the company's promise was to pay at a date certain out of a particular fund, there was "no undertaking that this fund would be sufficient to make good the deficit." Possibly that answer would be pertinent and sufficient if the stock had been matured by one hundred and twenty payments, and this was an action to recover the face value thereof from the corporation upon its promise, but that is aside from the question before us. In *Sumrall v. Columbia F. & T. Co.*, 20 Ky. 1801 (44 L. R. A. 596, 50 S. W. Rep. 69), the plan of the association was very similar to the one we are now considering. The association becoming insolvent, the holders of the guarantied stock sought to be given preference in the distribution of the assets. The relief was denied; the court, among other things, saying: "When we bear in mind that the corporation we are dealing with is a building and loan association, with certain underlying principles of co-operation, equality, and mutuality in its make-up, not common to ordinary corporations, and which may be termed the common law of its existence, the objection to upholding preferential contracts among members becomes apparent. All such attempts are absolutely void, as contrary to the natural law of such associations." Dealing with the same question, the Supreme Court of Illinois says: "The plan of issuing stock containing such agreements is entirely foreign to the purposes of the corporation contemplated by the statute, and we cannot but regard them as of no force or effect." *King v. International, etc.*, 170 Ill. 185 (48 N. E. Rep. 677). Many other authorities of like nature could be cited, but the principle announced seems so reasonable and so consonant with well-recognized requirements of public policy, which hold these and other corporations to fair observance of the limitations by which their power to contract is bounded, that further quotation is not called for.

II. The plea of estoppel is not well founded. The fact that plaintiff made numerous payments upon the stock induced no act or change of condition on the part of

the company, nor has it been prejudiced by her delay. She was morally, if not legally, bound, in any event, to return the money she had received. That duty she has performed, and she is entitled to a discharge of the mortgage liens, unless we find the contract is to be enforced according to its terms, under the building and loan statute, which, as we have said, cannot be done.

III. The legalizing act (chapter 48, page 32, Laws 27th General Assembly), has no application here. That act provides, in effect, that section 1898 of the Code of 1897 shall apply to outstanding contracts of building and loan associations. This legalizes, as we have already repeatedly held, the system of premiums, fees, and fines which are recognized by said section 1898, and by the use of which high rates of interest were exacted; but there is no provision in the Code of 1897, or in the act of the Twenty-Seventh General Assembly, which directly or by implication gives validity to an issuance of preferred stock, or to discrimination between shareholders.

IV. While we hold the mortgages and notes unenforceable as a building and loan contract, under our statutes, it is not necessary for us to consider whether any such general invalidity inheres in the contract that it may not be enforced as an ordinary loan. Plaintiff has chosen to treat the claim against her as enforceable to that extent, and has made a sufficient tender on the basis of such computation. This, we think, is the extent of the rights of the assignee of the company, and the decree of the district court is therefore **AFFIRMED**.

WILLIAM BURGE, Appellant, v. TOWN OF ROCKWELL CITY.

Municipal Corporations: COMMITTEE OF COUNCIL: ACTS OF:

- 1 **WHEN VALID.** Where a city council appoints a committee to perform a municipal act, it cannot bind the corporation except upon notice of the time and place of meeting to all its members.

Contract by Committee: MODIFICATION OF: EVIDENCE. A city council

- 2 appointed a committee of three with full power to procure a water supply for the city, and, if necessary, to sink a well. The committee made a contract for a well of specified dimensions. Subsequently two members, without notice to the third, modified the contract with respect to the diameter of the well. *Held*, such act was invalid and the contract so modified was not enforceable.

Appeal from Calhoun District Court.—HON. S. M. ELWOOD,
Judge.

TUESDAY, MAY 19, 1903.

ACTION on contract for the price of sinking a well; also for the reasonable value of the work done. Judgment was rendered on a directed verdict for the defendant. The plaintiff appeals.—*Affirmed*.

John Newburn for appellant.

E. C. Stevenson for appellees.

LADD, J.—Much of the work by municipalities is executed by committees duly appointed by their governing bodies. In matters wherein they act in behalf of the state for governmental purposes, methods of procedure are usually, though not always, definitely prescribed. If the exercise of legislative discretion is exacted, the power to act may never be delegated. Affairs pertaining to the

control of utilities in which the city or town enjoys a proprietary interest are quite generally left to the management of the local authorities, under such methods as they may deem it wise to adopt. In exercising their powers in respect thereto the governing bodies may, in the absence of

statutory restrictions, delegate all functions purely ministerial or administrative to committees of their own members, by whose

action the corporations are bound as absolutely as though these bodies had acted directly. *Driscoll v. Ind. School Dist. of Council Bluffs*, 61 Iowa, 466; *Hitchcock v. Galveston*, 96 U. S. 341 (24 L. Ed. 659); *State v. Asbury Park*, 626 N. J. Law, 158 (40 Atl. Rep. 690); *Baily v. Philadelphia*, 184 Pa. 594, (39 L. R. A. 837, 63 Am. St. Rep. 812); *Ecroyd v. Coggeshall*, 21 R. I. 1 (41 Atl. Rep. 260, 79 Am. St. Rep. 741); *Birdsall v. Clark*, 73 N. Y. 73 (29 Am. Rep. 105); 20 Am. & Eng. Enc. of Law, 1219. Nor is unanimity of such committees required. In *Sioux City v.*

Weare, 59 Iowa, 95, the rule was laid down that "where power is intrusted to two or more, without an express provision that either one alone may exercise it, it can be exercised by the concurrent action of at least a majority." See, also, *Mallory v. Montgomery County*, 48 Iowa, 681; *Rice v. Plymouth County*, 48 Iowa, 136. If composed of two members only, both must concur. *Rider v. Portsmouth*, 76 N. H. 298 (38 Atl. Rep. 885.) In *Murdough v. Revere*, 165 Mass. 109 (42 N. E. Rep. 502), the court held that a part of the members of a committee, by their separate action, not at a meeting of the committee, cannot set aside the formal action of the committee as a whole. As to whether an agreement of all the members of the committee, acting individually, is binding, see *Shea v. Milford*, 145 Mass. 528 (14 N. E. Rep. 764). Says Judge Dillon, in his work on Municipal Corporations (section 283): "If all the members of a select body or committee, or if all the agents, are assembled, or if all have been duly

1. COMMITTEE
of council:
acts of when
valid.

notified, and the minority refuse or neglect to meet with the others, a majority of those present may act, provided those present constitute a majority of the whole number. In other words, in such case, a major part of the whole is necessary to constitute a quorum, and a majority of the quorum may act."

Ordinarily all members of a committee should be notified of the time and place of its proposed meeting. Even though a majority will control, the minority ought to have the opportunity of being heard, for no one can say in advance what the effect of full discussion will be. Possibly, where notice would be unavailing, as in the case of absence or physical inability to attend, it may not be essential—a point not necessary now to decide. Certainly, in the absence of all excuse, two of three members of a committee cannot get together, without notice to the third, and undo what the three in former session have agreed upon. The rule is quite clearly stated in *Martin v. Lemon*, 26 Conn. 192: "If the act is merely ministerial in its character, a majority must at least concur and unite in the performance of it, but they may act separately, and need not be convened in a body, or be notified so to convene for that purpose; but if the act is one which requires the act of discretion and judgment, in which case it is usually termed a judicial act, unless special provision otherwise is made, the persons to whom the authority is granted must meet and confer and be present when the act is performed, in which case the majority of them must perform it; or, after all of them have been notified to meet, a majority of them, having met, will constitute a quorum, or sufficient number to perform the act, and, according to some modern authorities, the act may be legally done by the direction or with the concurrence of a majority of the quorum assembled." *Damon v. Granby*, 2 Pick. (Mass.) 345, 359. This decision was subsequent to that of *Gallup v. Tracy*, Vol. 120 Iowa.—32.

25 Conn. 10, where a committee of four was appointed at a town meeting to stake out oyster grounds. One member called two others together, and, by their concurrence, staked out the bed. The other member had been forgotten, and for this reason was not notified. The action of the committee seems to have been upheld on the theory that the statute authorized the members to act *seriatim*. Such, also, appears to have been the controlling reason for a somewhat similar ruling in *Weymouth v. County Commissioners*, 108 Mass. 142. The object in naming several persons as members of a committee is that they may consult, and their action speak the consensus of their combined wisdom. Each should at least be afforded the opportunity to perform his duty, and this is possible only through notification of the time and place of meeting.

II. The evidence adduced tended to show that the council of the defendant authorized its committee on waterworks, composed of Reynolds, Wheelan, and Owens, "to procure a sufficient supply of water for the town, and, if necessary, take the necessary steps to sink a well furnishing an ample supply of water." This committee entered into a written contract with plaintiff "to construct a tubular well eight inches in diameter, and to the depth of five hundred feet, if necessary to procure a sufficient supply of water for the use of the town, said supply and the quantity and sufficiency of the same to be left to the judgment of the committee." The furnishing of materials and price was also stipulated, and the condition added giving plaintiff the right "to reduce the size of said well to not less than a five-inch hole and said reduction is not to be made unless necessary to do so to put down said well." The plaintiff began work soon after May 17, 1900, and continued till August 1st, at which time a depth of about three hundred and fifteen feet had been attained. At that time, according to his testimony, he called the committee together at

a. CONTRACT
of committee:
modification
of: evidence.

his tent near the well. Only Reynolds and Wheelan responded, and to them he explained that it would be necessary, because of rock, to change from a six and one-fourth inch to a five and three-sixteenths inch casing, and asked that, if another reduction in size should be found necessary, he be allowed to use a four and three-fourths-inch instead of a five-inch casing at the bottom. To this they agreed upon condition that he would accompany Reynolds to Cedar Rapids, and aid him in selecting material, and inducing the dealer to take back that not used. This he did, and five and three-sixteenths-inch and five-inch casing were procured, with which he reached a depth of four hundred feet, when shell rock was struck, and it was found necessary, as he declares, to make use of four and three-fourths inch casings. These he demanded, and, because of the defendant's failure to furnish them, was unable to complete his contract by sinking the well to the depth required.

III. The resolution of the council contemplated the sinking of the well under the direction of the committee. It conferred authority not only to contract therefor, but to see that its contract was executed. Its duty was to arrange for a well not of any specified size, but which should produce "a sufficient supply of water for the town." If, in accomplishing this, changes in the contract appeared necessary, it had precisely the same authority to make them as to enter into the original agreement. In *Shea v. Milford*, *supra*, the court went so far as to hold that a committee might add to or change the specifications for a building adopted by the vote of the inhabitants, in order to remedy defects in them, and to improve them in minor details, within reasonable limits. But the evidence fails to show that alterations were consented to by a committee as such. True, plaintiff testified that "he called the committee" to the site of the proposed well, and asked them to be permitted to use the four and three-fourths-inch

pipe, but it is manifest that he supposed Reynolds and Wheelan constituted the committee. He refers to them throughout as such. There is no showing that Owens had any notice of a meeting, or knew of it, and he certainly did not attend. Nor does it appear that plaintiff was authorized to call the committee together. As already observed, all members of such committee should be notified of the time and place of its meeting, in order to render the action of the majority of those present binding on the municipality. If, then, Reynolds and Wheelan did consent to the modification of the contract, as contended, the defendant was not bound thereby. The wisdom of this rule is illustrated by the subsequent refusal of the full committee, and also of the council, to consent that the change be made. The plaintiff was without excuse for failing to comply with the contract.

Some rulings on the admissibility of evidence are complained of, but, in view of our conclusion, these were not prejudicial.—AFFIRMED.

**HENRY WILKEN, Appellant, v. CHRIST VOSS, CAROLINE VOSS,
AND JOHN VOSS, Appellees.**

Vendor and Purchaser: SALE OF LAND: RESERVATIONS: SPECIFIC

- 1 PERFORMANCE.** Where the purchaser of real estate is informed by the vendor before a contract of sale is executed that he will make certain reservations, and by mistake or oversight the agent of vendor omits a part of such reservations from the written contract, specific performance will not be decreed at a suit of the purchaser.

Performance by Purchaser: PAYMENT. An agent for the sale of

- 2** land has no implied authority to accept in part payment anything but cash, and where the contract recites part payment in a stated sum, which is not in fact paid in money, there is a failure of the purchaser to perform the contract which will defeat specific performance at his suit.

Appeal from Tama District Court.—HON. G. W. BURNHAM,
Judge.

TUESDAY, MAY 19, 1908.

SUIT in equity for the specific performance of an agreement to convey real estate. The contract was made by an agent of defendant, and defendant pleaded that the agreement was without authority, and that it failed to contain certain stipulations which should have been exacted from the purchaser. Trial to the court. Decree for defendants, and plaintiff appeals.—*Affirmed.*

Caldwell & Walters for appellant.

G. L. Wilbur and *C. B. Bradshaw* for appellees.

DEEMER, J.—A written contract for the sale of the land in controversy was executed by and between plaintiff, acting on his own behalf, and one Martin Mee, acting as agent for John Voss, the then owner of the record title to the land, which provided, among other things, for a cash payment of \$1,800, and contained a reservation as follows: "It is also understood and agreed that 1st party reserves machinery shed, and all wires but three on pasture fence west of the house, and shall pay 1899 tax, 1st party agrees to leave premises in as good condition on March 1st, 1900, as they are now in." The remainder of the consideration, to wit, \$3,000, was to be paid on March 1, 1900, at which time deed was to be made by defendants, and possession delivered to plaintiff. There is no doubt that Mee was the agent of Voss, and that he had authority to sell the land on certain terms and conditions. Among these were that Voss was to have \$60 net per acre for the land, and was to surrender possession March 1, 1900, and that, if Mee could not get more than \$60 per acre for the land, he (Mee) was to have the use of the money received by him

on the purchase price from the time of making the contract until March 1, 1900. There is a controversy regarding the reservations which Voss insists should have been made in the contract of sale, and also regarding the payment of the purchase price by plaintiff.

The rules of law involved are not in dispute. Specific performance is not granted as of right in every case, even though there be a valid contract. It will not be granted where it would be inequitable to do so, nor will it be enforced where there is strong ground for believing that the parties did not understand the contract alike. *Hopwood v. McCausland*, 120 Iowa, 218. The evidence shows,

1. SALE of land:
reservations:
specific per-
formance.

beyond all question, that plaintiff, before contracting for the purchase of the land, was told by John Voss, the owner, that he should reserve an entire new two-wire fence and posts, built that season, a machine shed, three wires from a fence around what was known as the "old pasture," and a pigeon house. While negotiating with Mee for the sale, plaintiff told him (Mee) about the reservations demanded by Voss; but, instead of inserting them in the contract, he (Mee) made the reservations as they appear, and at the same time told Wilken that Voss could not hold the two-wire fence or the pigeon house, and that they should stay on the place. Mee made these statements because of an understanding he had with Voss as to what should be reserved. But for the fact that he (Mee) was informed by plaintiff himself as to the reservations defendant would insist upon, we should be inclined to hold that the contract contained all the reservations which defendant was entitled to insist upon, for the preponderance of the evidence shows that the contract contains all the reservations which defendant told his agent, Mee, to insert therein. Whether or not Voss failed through mistake or inadvertence to mention all the reservations when talking with his agent regarding the terms of the sale, it is apparent that plaintiff knew

the terms on which defendant was willing to sell, and that this information was imparted to the agent, Mee, before the contract was consummated. As these differed in some respects from those given the agent, good faith required that this agent investigate the matter before closing the contract, in order that all possibility of mistake might be avoided. We are not to be understood as holding that there was any actual bad faith on the part of the agent. He, no doubt, acted honestly on the information given him by Voss; but he knew when talking with plaintiff that defendant was claiming more reservations than were named in the conversation with him, and, instead of advising against the defendant's claim, he should have investigated as to whether or not there had been a mistake in the terms given him. The written contract as will be noticed, does not contain the reservations which defendant told plaintiff he should insist upon; and, through mistake, inadvertence, or accident, the minds of the parties did not in fact, fully meet on the terms of the sale. *Wickham v. Winchester*, 75 Iowa, 327, seems to be decisive of the case on this proposition. There evidently was a mistake or misunderstanding between these parties, which was known to plaintiff at the time he made his contract of purchase.

This in itself is sufficient to dispose of the case. There is another point, however, which is equally conclusive. While the contract recites the payment of \$1,800 in cash by plaintiff to Mee, no such sum was paid. On the contrary, plaintiff gave a certificate of deposit for the sum of \$600, and a note for \$1,200, running to the Tama County Bank. There is no showing that this note was paid until after March 1, 1900, and after defendant had repudiated the contract. An agent to sell land has no implied authority to accept anything but cash in payment or part payment therefor. This is fundamental doctrine. Plaintiff has, therefore, failed to show performance on his part, and the delivery of the

2. PERFOR-
MANCE by
purchaser:
payment.

certificate of deposit and the note to the agent was unauthorized. The case turns, however, on the fact that the reservations imposed by defendant, of which plaintiff had knowledge, were not included in the contract through mistake or otherwise, and that, in view of this fact, the agreement should not be specifically enforced.

There is a claim that defendant ratified the contract after it was made. Ratification, to be of any avail, must be with full knowledge of the facts. This is not shown by sufficient testimony. The trial court had the witnesses before him, and, while the case is triable *de novo*, we are disposed, when the evidence is close, as in this case, to give this fact importance, and to attach some weight to the findings of the trial court, who had the great advantage of seeing the witnesses who gave testimony.

Our conclusions accord with those of the trial court, and its decree is **AFFIRMED**.

KUH, NATHAN & FISHER COMPANY, Appellees, v. MORRIS GLUCKLICK AND H. E. BOYD, Trustee, Appellants.

Sales: FRAUD OF PURCHASER: REPLEVIN: PLEADINGS: EVIDENCE.

- 1 In a replevin action by the seller alleging generally that the goods were purchased through false representations made by the purchaser of his financial condition, the written statement of the purchaser showing his condition, made at the seller's request, is admissible, and in such an action proof of fraud is a part of plaintiff's main case.

Evidence: ADMISSION OF CASH BOOK. In a replevin action based

- 2 on the fraud of the purchaser of the goods, his cash book, made up from memoranda of sales and disbursements, is admissible to show in a general way the character and extent of his business, though such memoranda is not produced and the entries in the cash book are not verified by the party making them; and this is true even though a trustee in bankruptcy has been substituted as a party defendant.

Fraud of Purchaser: EVIDENCE. A trustee in bankruptcy takes

- 3 only such title to the property as the bankrupt had, and in an

action against the trustee for the possession of goods sold the bankrupt on the strength of his fraudulent representations as to his financial condition, the petition in bankruptcy and schedules attached are admissible to show the fraud.

Value of Goods: INSTRUCTION. In a replevin action against a
4 trustee in bankruptcy for goods sold the bankrupt, where no judgment is asked except for possession of the goods, an instruction that the jury find the full value of the goods sold is not prejudicial error.

Default Judgment Against Purchaser. In a replevin action on
5 the ground that the sale of the goods was induced by the fraud of the purchaser, in which the purchaser's trustee in bankruptcy is substituted party defendant on his own motion, if the original defendant defaults, a judgment should be entered against him for the value of the goods not found.

Appeal from Dallas District Court.—HON. J. D. GAMBLE,
Judge.

WEDNESDAY, MAY 20, 1908.

ACTION of replevin, brought by the plaintiff corporation to recover possession of certain goods alleged to be detained by the defendant Glucklick, then a merchant doing business at Perry. At the time of filing the petition plaintiff procured a writ to be issued and delivered to the sheriff of the county, under which a portion of the goods described in the petition were taken possession of and delivered to plaintiff. It appears that thereafter Glucklick was adjudged a bankrupt in the United States District Court, upon his voluntary petition, and H. E. Boyd was selected and qualified as trustee pursuant to the federal statutes relating to that subject. Thereupon said Boyd appeared in the court below, and filed a motion in this action, in which he set forth the bankruptcy proceedings and his appointment as trustee, and asked that he be substituted as defendant, and permitted to defend the action. Such motion having been heard, an order was made and entered as follows: "H.

E. Boyd, trustee, is substituted as defendant." Glucklick did not enter his appearance or file any pleading before trial. Boyd filed an answer to the petition, and upon the issues thus joined trial to a jury was had, resulting in a verdict in favor of plaintiff, and fixing the value of the property in controversy at \$1,991.25. Defendant Boyd filed motion for new trial. Plaintiff filed motion for judgment upon the verdict, in which motion judgment is asked as against both defendants for costs; also that plaintiff be adjudged to be the owner of that part of the property taken under the writ being of the value of \$1,241.75, and entitled to possession of the same; further, that judgment be entered in its favor as against defendant Glucklick for the value of the property sought to be recovered, and not found, the same being shown to be of the value of \$749.50, which judgment plaintiff elected to take. Both defendants appeared to the motion for judgment, and filed resistance thereto. The motion for new trial was overruled, and the motion for judgment was sustained as to both defendants. Thereupon judgment was entered as prayed in such motion. The defendants separately served and filed notices of appeal.—*Affirmed.*

Shortley & Harpel for appellant Glucklick.

Giddings & Winegar for appellant Boyd.

White & Clarke for appellee.

BISHOP, C. J.—First as to the appeal of the defendant Boyd. The petition alleges the facts constituting the wrongful detention of the property, according to the belief of plaintiff, to be that defendant Glucklick claims to have purchased the same of plaintiff. Plaintiff alleges, however, that the delivery of such goods to Glucklick was procured by false and fraudulent representations made by him to plaintiff at the time of such delivery, as to his

solvency and financial condition and standing, and as to his intention to pay therefor, which false and fraudulent representations were knowingly made, and were for the purpose of wrongfully and fraudulently procuring the delivery of such goods to him; that such representations were believed to be true and relied upon by plaintiff in making delivery of the goods to him, said Glucklick. By a subsequent amendment it is alleged that at the time defendant procured such goods to be delivered to him he did not intend to pay for the same. The answer of Boyd admits the purchase of the goods from plaintiff by defendant Glucklick; alleges that such purchase was in good faith, and that thereby Glucklick became the absolute owner, and entitled to the possession and control of such goods; denies the false and fraudulent representations alleged.

I. Upon the trial it was made to appear that the first order for goods was received by plaintiff from Glucklick in June, 1900. Upon receipt of such order, and before

1. FRAUD of
purchaser:
replevin:
pleading:
evidence.

proceeding to fill the same, plaintiff required, and there was furnished by defendant, property statements in writing, showing his assets

and liabilities and general financial standing. These statements were produced by plaintiff, and offered in evidence as part of its main case. To such the defendant Boyd objected as incompetent and immaterial and for the reason that there is no allegation in the petition charging that any such representations were made. The objection was overruled, and, based thereon, defendant now assigns error. We think the ruling was correct. The petition charges false and fraudulent representations, and certainly the representations in fact made were material under such allegations. It was neither necessary nor proper to set out in the petition, in *hæc verba*, all written papers or statements upon which plaintiff expected to rely to establish the fact that false representations, in character as alleged, were made. The allegations of the petition are

general, and it seems to be the thought of counsel for appellants that, because the court overruled a motion for more specific statement, evidence of specific representations ought not to be admitted. It is not contended that there was error in the ruling upon the motion. Conceding, therefore, that the ruling was correct, still there is no tenable ground upon which to base a refusal to admit evidence, otherwise competent, in support of the general allegations found in the petition. Counsel further argue that the evidence was improperly admitted, for that proof of fraud was unnecessary to the main case of plaintiff; that, if admissible at all, it should have been made in rebuttal, under proper allegations in a reply. This cannot be true. It has been repeatedly held that when a delivery of goods has been procured by false representations as to solvency it may be avoided, and the vendor may recover the goods. *Cox Shoe Co. v. Adams*, 105 Iowa, 402; *Morris v. Posner*, 111 Iowa, 335; *Phelps v. Samson*, 113 Iowa, 145. Clearly, it was upon this theory that the plaintiff's action here was brought. It was essential to a recovery, therefore, that fraud should be established. The petition discloses in substance that a sale in form, at least, had been made of the goods to defendant Glucklick. The effect of this is sought to be avoided, and a verdict of no sale secured, by allegation and proof of fraud. Such allegations and proof are vital elements, in the absence of which there could be no recovery in this form of action. The case of *Kervick v. Mitchell*, 68 Iowa, 273, relied upon by counsel, does not support their contention, as we read the opinion. In that case fraud was not in any way alleged in the petition, and it was accordingly held that evidence of fraudulent representations was not relevant to the issue. As supporting our position, see *Nolan v. Jones*, 53 Iowa, 387.

II. Plaintiff offered in evidence a cashbook kept by defendant Glucklick, which, as testified to by him, con-

tained the record of cash sales and disbursements made by him while in the conduct of the business. It

2. EVIDENCE; admission of cash book. appears that the account of daily cash sales and disbursements was kept by a cashier on small memorandum slips; that from time to time these slips were taken and posted into the cashbook by defendant's wife. The slips were not produced, nor was the cashbook verified by the person making the entries therein. The admission of the book in evidence was objected to as incompetent, because not properly verified, and secondary. This objection was overruled, and, we think, properly so. Any evidence competent as against Glucklick was competent as against Boyd. Further upon this subject, see the succeeding division of this opinion. The evidence offered was material to but one issue—that of the fraud alleged; and, as bearing upon this issue, all matters connected with the conduct of the business by Glucklick tending to prove the amount and character of the business done by him, or showing the amount and value of the property owned by him or in his possession, was both competent and material. It may be true that under other conditions, and for some other purposes, the book would not have been admissible. But, as having relation to the case here made, it was a book kept under the direction of Glucklick as a record of his cash transactions, and competent under the fraud issue to show in a general way the character and extent of such transactions. The weight and effect of such evidence was for the jury.

III. Defendant Boyd further complains and assigns error because the petition in bankruptcy and schedules attached filed by Glucklick in the bankruptcy court were

3. FRAUD of purchaser: evidence. admitted in evidence over his objection. It is said in argument that such evidence was incompetent for the reason that the same did not relate to the matter of title or possession of the property in controversy, and for the further reason that "Glucklick

was not in possession of the property in controversy when the so-called declaration was made." Counsel are in error in assuming that Boyd, under the order substituting him as defendant, occupied any different position, or bore any different relation, to the litigation from that which would have obtained had the answer been filed and the defense made by Glucklick. Boyd, as trustee, simply took whatever interest in the goods in controversy Glucklick had; no greater and no less. All infirmities which inhered in the title to such goods as against Glucklick were available as against Boyd. It would be strange, indeed, if one holding goods which had been obtained by fraud, or concerning which the title was otherwise defective, might avoid the fraud or perfect the title in any sense or to any degree by passing such goods over to an assignee or trustee. Boyd could not, therefore, and in his pleading he does not, claim to be possessed of any right or title other or different from the right and title in truth and in fact possessed by Glucklick. The case is vastly different from one where the statements or declarations of a vendor, made after delivery of possession, are sought to be introduced to affect the title to the property in the hands of his vendee. Such are the cases cited and relied upon by appellant, and it is manifest that they are not in point. Here the evidence sought to be introduced was competent as bearing upon the question of the financial condition of Glucklick, and such, in turn, was material to a determination of the fraud issue tendered by the petition. A trustee in bankruptcy "becomes vested with the same kind of a title as though he were a purchaser, but such title is subject to all the rights and equities existing in favor of third persons against the bankrupt, except as to fraudulent conveyances and transfers, preferences, and other transactions in fraud of the bankruptcy act." 5 Cyc. 341, and cases cited in the notes.

IV. Other assignments of error are made, based on rulings in connection with the introduction of the evi-

dence. We have examined the record with respect to each of such, and find no prejudicial error. We have also read the instructions given to the jury. They are as favorable to the defendant as he had the right to expect, and we discover no prejudicial error therein. The instruction asked by the defendant had no application to the issues in this case, and was properly refused. It is said that the court erred in directing the jury to find the full value of all the goods delivered to Glucklick by plaintiff in the event that plaintiff was found entitled to recover. The jury found the full value of such goods to be \$1,991.25. We think that in this there was no error. But, in no event, could such finding be prejudicial to the defendant Boyd. The effect of the verdict was to confirm in plaintiff the right to the possession of the goods taken under the writ. No affirmative relief was asked as against said defendant, and no judgment was rendered against him, save that his right to the possession of any of the goods in controversy was denied. On the whole, we think the case was fairly submitted to the jury, and that the record discloses evidence sufficient to warrant the verdict rendered.

We now take up the question raised by the appeal of the defendant Glucklick. The action, it will be observed, was commenced against Glucklick alone. No appearance for him or on his behalf was made. Such being the condition of the record, the plaintiff was entitled upon demand at any time, and upon proving up, to a default judgment awarding to it the possession of the property in controversy, or, if the same or any portion could not be found, then for the value thereof. This must be true unless the appearance of Boyd, trustee, and the defense made by him, had the effect to suspend the operation of the general rule. As we think, no such effect can be given the proceedings for an order of substitution. To begin with, the appearance

4. VALUE of
goods: in-
struction.

5. DEFAULT
judgment
against pur-
chaser.

of Boyd was upon his own motion, and therewith the defendant Glucklick had nothing whatever to do, as far as shown by the record. Now, it would be strange doctrine to say that the right of a plaintiff to pursue his remedy afforded by the law, and this as fully and completely as the facts alleged in his petition will warrant, may be cut off, and the defendant discharged, and this for no other reason than that a third person, claiming an interest in a part of the property in controversy, has procured himself to be made a defendant, and has made defense. Surely, such is not the law, and we cannot conclude that the trial court intended by using the word "substituted," in the order made, to wholly discharge Glucklick from further connection with the case. Indeed, there was no power in the court so to do. Having commenced the action against him, the plaintiff had the absolute right to such judgment as it might show itself entitled to, and of this the court could not lawfully deprive it. That an order of substitution having the effect to discharge the person for whom substitution is made may be proper in some cases, we may concede; but such will not be made where any interest of the opposite party will be prejudiced thereby. *Snyder v. Phillips*, 36 Iowa, 481, is a case illustrative of this principle. In that case an order was asked for the substitution of the party plaintiff. Such order was refused, and in the course of the opinion the court says: "If such substitution can be made without depriving the defendant of a substantial right, it should, and no doubt would, be made. To have made it in this case would have deprived the defendant of such right," etc.

That the principle is equally applicable to a case where substitution of a party defendant is sought to be made seems too clear for argument. Such principle, we think, has special application to this case. The value of the goods taken under the writ was \$1,241.75. The trustee, Boyd, appeared to claim such goods only. The value of

the entire lot of goods mentioned in the petition was \$1,991.25. Plaintiff was, therefore, entitled to demand judgment for the possession of the goods so taken under the writ, and, in addition thereto, to demand judgment against Glucklick for the value of that portion of the goods not found. It is manifest that no money judgment could have been recovered against Boyd even had such been demanded by proper pleading. We conclude, therefore, that by the order of substitution it was intended simply to permit Boyd to make claim to the goods levied upon under the writ of replevin; that Glucklick, who was not a party to such order, and who is not shown to have been prejudiced in any way by the making thereof, cannot take refuge behind the same to shield himself from a judgment for the value of the goods sued for and not found. He had secured no order of discharge, and he had no right to assume that the order permitting Boyd to make defense was intended to free him from all further responsibility or liability to the plaintiff. That such was the thought of the trial court is further evidenced by the fact that after verdict, and while yet the record was within its control, the motion for judgment against Glucklick was entertained and granted, proof having been made by plaintiff of the value of the goods not found, and judgment entered accordingly. Finally, defendant Glucklick is in no position to claim that any prejudice has resulted to him. He was given his day in court, and in no sense was he prevented from making defense. The proof shows the value of the goods not found, and for such he was clearly liable to plaintiff, and the judgment was for the amount thereof. A right conclusion was thus reached, and we think defendant ought not to be heard to complain thereof.

The judgment on both appeals is **AFFIRMED**.

MAUD STOVER, Appellee, v. MRS. J. FLOWER, Appellant.

Landlord and Tenant: AGENCY: UNAUTHORIZED LEASE: PAYMENT

- 1 **OF RENT.** An agent in the absence of express authority cannot make a valid lease of his principal's property to be used for an immoral purpose, and a payment of rent to the agent under an unauthorized lease will not bind the principal.

Repayment of Rent: LIABILITY OF LANDLORD. The promise of an
2 agent to repay money advanced to him on an unauthorized contract of lease cannot be enforced against the principal in the absence of a showing that the principal had received some benefit therefrom.

Repayment of Rent: LIABILITY OF LANDLORD: PRESUMPTION.

- 3 Where one enters into a conspiracy with an agent to lease property of the principal, in the name of another and for an immoral purpose, there is no presumption that the agent was unauthorized to receive rent therefor, and money paid the agent under such circumstances cannot be recovered from the principal.

Illegal Contract: RECISSION: REPAYMENT. When an agent with-
4 out authority leases property for an immoral purpose and receives part of the rent, it cannot be recovered from the principal on disaffirmance of the contract.

New Trial. While the granting of a motion for a new trial is
5 largely discretionary with the trial court, yet where a case has been properly determined on its merits, a new trial should not be allowed, and will be reversed on appeal.

Appeal from Marshall District Court.—HON. OBED CABELL, Judge.

WEDNESDAY, MAY 20, 1903.

APPEAL from an order sustaining plaintiff's motion for a new trial in an action wherein she sought to recover damages for defendant's failure to observe a contract of lease of certain rooms in a building in the city of Mar-

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shalltown, and to recover the sum of \$120 paid to defendant's agent. The issues and facts will appear in the opinion.—*Reversed.*

Theoderick F. Bradford for appellant.

Robert Shirk and J. M. Whitaker for appellee.

DEEMER, J.—Plaintiff claims that she leased certain rooms in a building in the city of Marshalltown, for the term of one year, from William Flower, the husband and agent of the defendant, at the agreed rental of \$30 per month; that she paid to said agent the sum of \$120 upon the rent; that defendant refused to allow plaintiff to enter the premises, but canceled the lease, and refused, and still refuses, to return the \$120, although demand has been made therefor; and she asked judgment for damages in the sum of \$120, with interest. In an amendment to her petition, filed during the trial, she averred that defendant refused to ratify the contract made by her agent, but disapproved the same, and refused to allow plaintiff to take possession; that defendant's agent thereupon promised to return the money received by him; that she (plaintiff) thereupon rescinded the contract, and accepted the promise to return the money, but that neither defendant nor her agent made return of the funds so received, although often demanded; and that, as defendant has received the \$120, which she refuses to return, plaintiff is entitled to judgment for that amount. Defendant pleaded in answer that, while William Flower was her agent, he had no authority to lease the property for illegal purposes; that in fact the property was rented to plaintiff for the purpose of maintaining therein a house of ill fame. She also pleaded a general denial of the allegations of the original petition. To the amended petition defendant pleaded a general denial, and also specifically denied that there was any agreement to abandon the lease and refund the money; pleaded there was no consideration for the alleged

abandonment, that the original contract was void, and the abandonment and surrender thereof was not a good consideration for the alleged agreement to refund.

There is no dispute over the fact that William Flower received \$120 for rent of the rooms, that he received it ostensibly as the agent for the defendant, and that this money has not been refunded to any one. There was evidence tending to show that this money was received from plaintiff through one Hanson for the use of the rooms, and there is no doubt that plaintiff was renting them for the purposes of prostitution. There was also evidence to the effect that the rooms were rented directly to Hanson, and that Hanson paid the rental therefor. If the rooms were rented to Hanson, then, of course, plaintiff cannot recover. If they were rented to plaintiff, it was for an illegal purpose, and she cannot recover, save on one theory, to which we shall hereinafter refer. It also appears from the evidence that, if the rooms were rented to plaintiff, it was against the express protest of the defendant, and that Hanson's name was used for the purpose of concealing the true facts from her. There is no question that both plaintiff and William Flower understood that defendant would not consent to the leasing of the rooms to the plaintiff, and that the matter was kept concealed from defendant until after the money was paid and the lease executed. When the defendant learned of the matter, she wrote to plaintiff, expressly repudiating the lease, and plaintiff made no further effort to get possession. There was also some evidence that William Flower promised to return the money received by him. Defendant's evidence also tended to show that the property was not leased to plaintiff, but to Hanson, and that Hanson was never denied the use and possession of the rooms. There is also, some evidence which tended to show that plaintiff surrendered her lease and rescinded the transaction.

On these issues and this evidence the case was submitted to a jury, the court instructing, in effect, that, if the plaintiff leased the property for a lawful purpose, and paid part of the rent, and that defendant, after receiving the rent, refused to permit plaintiff to take possession, then plaintiff was entitled to recover; that, if the property was rented to Hanson, and plaintiff undertook to take possession thereof, under the lease, for immoral purposes, then she could not recover; and that, if the contract of lease was for an immoral purpose, plaintiff could not recover. The jury was also instructed as follows: "(7) If you find the fact to be that before the consummation of the leasing of the premises in question, and after the plaintiff had paid defendant or her agent \$120 rent upon a lease to be completed, and you further find that before said contract and lease were completed the negotiations were broken off by defendant refusing to complete the same, and the same was then broken off and the same annulled, and it was then agreed between plaintiff and defendant, through her husband and agent that the said \$120 should be refunded and repaid the plaintiff, and you further find that the defendant has not done so, then your verdict should be for plaintiff, and the sum of \$120 and interest thereon at six per cent. from the payment of the same." There was evidence on which to base this last instruction, and, as we shall see, it was more favorable to plaintiff than she was entitled to. The verdict was for defendant. Plaintiff filed a motion for a new trial, and this motion was sustained, and the appeal is from this ruling.

The motion was based on misconduct of certain jurors, incompetency of some of the jurors to sit in the case, newly discovered evidence, error in rulings on evidence, in the instructions given and refused, and insufficiency of the evidence to support the verdict. There is no showing of misconduct of jurors, or of their incompetency to serve, and there is no affidavit from the parties who it is claimed

would give evidence which it is said was newly discovered. Hence these matters cannot be considered. The instructions fully stated the issues, and, generally speaking, were as favorable to the plaintiff as she could ask. There was a conflict in the evidence as to some of the matters in issue, as we have already pointed out. Plaintiff testified that she knew defendant did not want her husband to rent the rooms to her, but that the husband promised to keep it quiet until he and defendant had gone on a trip South, which they were then proposing to take, when he would break the news to her. The lease was made in the name of Henry Hanson for the evident purpose of deceiving the defendant. After the defendant and her husband went South, defendant wrote plaintiff that she did not want her to occupy the rooms, and that, if she, plaintiff, moved in, she, defendant, would make her all kinds of trouble. To this plaintiff said she responded by writing that she certainly would not move in after receiving her letter. Plaintiff then testified that William Flower, the agent, told her that she should not be uneasy; that, if she, plaintiff, could not occupy the rooms, he would refund the money.

Much of the evidence was incompetent, because secondary, but we set it out to demonstrate the character of plaintiff's claim. Without setting forth more of the testimony, it is enough to say that plaintiff knew the defendant would not approve of a lease made to her, and that, according to her version, she conspired with William Flower, the agent, to secure a lease which should conceal from defendant the fact that she, plaintiff, was to occupy the premises. The jury was fully justified in believing that plaintiff was leasing the property for an immoral purpose. If this were true, of course the agent was presumptively without authority to make such a contract, and a payment made to an agent under such circumstances would not be binding on his principal. Under neither theory could plaintiff re-

1. AGENCY:
unauthorized
lease: pay-
ment of rent.

cover the money paid the agent from the defendant. If she conspired with the agent to secure the rooms against the protest and wishes of the defendant, the payment made to the agent could not constitute the basis of a recovery from the principal. And so, if the payment was made to the agent for a lease in violation of law, and the agent had no express authority to make such a contract, the payment to the agent could not be made the basis of a recovery from his principal, in the absence of a showing that the principal in fact received some benefit from the payment. Even here, if the contract was for an illegal purpose, the law will leave the parties where it finds them. There is one exception to the rule, to which we shall hereinafter refer.

The seventh instruction which we have quoted refers to the promise to repay, and was more favorable to the plaintiff than she was entitled to. Accepting this as the law, there was a decided conflict in the evidence relating thereto, which a jury alone could settle. The jury settled this conflict, and plaintiff should be content, especially in view of the fact that under her own version of the affair she was not entitled to recover from the defendant. There is no evidence that defendant herself ever had any benefit from the money, or that she ever promised to repay the same. The only promise testified to is one said to have been made by William Flower, wherein he stated that he had the money in his safe, and would return it. This promise would not be binding on defendant without some showing that he was authorized to make it for her. There is no testimony of any such authorization.

From the facts above recited it is clear that there is no presumption on which plaintiff may rely. If plaintiff and the agent entered into a conspiracy whereby plaintiff was to receive the rooms under another name for the purpose of deceiving the

1. REPAYMENT
of rent: lia-
bility of
landlord.

3. REPAYMENT
of rent: lia-
bility of land-
lord: pre-
sumption.

defendant, and against her express protest, it is manifest that a payment of money made to her husband under such circumstances could not, in any sense, be said to have been made to the defendant. And so, if the money was paid to an agent for a lease for an unlawful purpose, there is no presumption that the agent was authorized to receive the money for and on behalf of his principal. Hence a payment made to him under such circumstances would not be binding on his principal. It is clear, then, that defendant never personally had any benefit from the money received by the agent, and that his promise to refund, even if made, would not be binding on defendant. He alone, if any one, would be responsible under such circumstances. Moreover, if the money was paid to him for a lease for an immoral purpose, plaintiff could not recover without showing a voluntary rescission of the contract—a *locus pœnitentiæ*, as it is sometimes called. The general rule is that in cases of illegal contract the party performing his part cannot recover on the grounds of an implied promise on the part of the party receiving the benefit therefrom to pay therefor, as the law will imply no promise to pay for

benefits received under an illegal contract on account of performance thereof by the other party. *Steever v. R. R.*, 62 Iowa, 371; *Gleason v. R. R.*, (Iowa) 43 N. W. Rep. 517; *Peck v. Burr*, 10 N. Y. 294; *Kinney v. McDermott*, 55 Iowa, 674. But it is quite generally held that, so long as an illegal contract remains executory, and the illegal purpose has not been put in operation, the one who has paid money thereon to the other party may repudiate the contract and recover back the money. This has been spoken of as the right of repentance. *Congress Co. v. Knowlton*, 103 U. S. 49 (26 L. Ed. 347); *Wasserman v. Sloss*, 117 Cal. 425 (49 Pac. Rep. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209); *White v. Franklin Bank*, 22 Pick. 181; *Tyler v. Carlisle*, 79 Me. 210 (9 Atl. Rep. 353, 1 Am. St. Rep. 301); *Lafferty v. Jelley*, 22

4. ILLEGAL
contract:
rescission:
repayment.

Ind. 471; *Souhegan Bank v. Wallace*, 61 N. H. 24; *Hooker v. De Palos*, 28 Ohio St. 251; *Dauville v. Mirrick*, 25 Wis. 688. We have recognized this doctrine, to some extent at least, in *Munns v. Donoran*, 117 Iowa, 516; *Williamson v. C. R. I. & P. R. R.*, 53 Iowa, 126; *Sayre v. Wheeler*, 31 Iowa, 112. Doubtless a like rule obtains when the illegal contract has been mutually abandoned, and a new promise is made to return benefits received. *Stout v. Ennis*, 28 Kan. 706. There is a conflict of authority on this proposition, and we do not care to pronounce definitely thereon at present. Should we apply any of these exceptions to the case made by plaintiff, it is manifest there can be no recovery from defendant, for the plain reason that she never received the money, and never promised to return it. The money was received by her husband, without her authority, and against her expressed wish. She never had any benefit therefrom, and her husband had no authority to rescind the alleged contract, and to bind defendant by a promise to return the money received thereon to the plaintiff. If there was any right of action, it was against the husband, who received the money, and plaintiff could not, on any theory, recover it from defendant.

While the matter of sustaining a motion for a new trial rests largely in the discretion of the trial court yet this discretion is a legal one, and, where improperly exercised, will be reviewed, and the ruling reversed by this court. Where justice has been done, and the case properly decided on the merits, a new trial should not be granted. The plaintiff, on her own showing, was not entitled to recover from the defendant. She may have been entitled to a judgment against William Flower, and the only reason she did not pursue her remedy against him seems to be that he is insolvent. That is her misfortune, and one of the penalties she must pay for entering into this kind of a transaction. The verdict was

5. New trial.

clearly right, and the motion for a new trial should have been overruled. The ruling must, therefore, be reversed, and the case remanded for judgment on the verdict. — REVERSED.

ANDREW McQUEENY, Appellant, v. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Railroads: INJURY TO EMPLOYEE: ASSUMPTION OF RISK. Where an
 1 employer, or those representing him, furnishes a reasonably safe place to work, reasonably safe tools, and reasonably competent fellow laborers, then the employe assumes the risk of the employment. Under this rule a railway company is not liable for injuries to an employe caused by the caving of a bank beside which the employe is at work, where the same was due to the nature of the soil, which is apparent.

Liability of Employer: CO-EMPLOYEE: RANK: NEGLIGENCE. Lia-
 2 bility of an employer for the negligent act of a foreman does not depend on the difference in rank but on the nature of the employment. If engaged in something which might have been done by another employe, rank is immaterial, and the general rule as to co-employees is applicable.

Appeal from Sac District Court.—HON. Z. A. CHURCH, Judge.

WEDNESDAY, MAY 20, 1903.

ACTION to recover damages for personal injuries received by plaintiff while in defendant's employ from the caving in of a gravel bank, about which he was engaged, assisting in the operation of a steam shovel. At the conclusion of plaintiff's evidence the court, on motion, directed a verdict for defendant, and from judgment on such verdict the plaintiff appeals.—*Affirmed.*

R. L. McCord, Jr., and Chas. D. Goldsmith for appellant.

J. C. Cook and H. Loomis for appellee.

120 522
124 41

120 522
131 709

120 522
136 435

120 522
137 451

120 522
144 647

McCLAIN, J.—The evidence for plaintiff showed without conflict that plaintiff was employed to work around the steam shovel as a laborer, and that he had had considerable experience in that situation; that in the operation of the steam shovel it was not an unusual occurrence for the chain to get off the pulley at the end of the boom or movable part of the crane, and that when it did so it was a part of the duty of plaintiff to assist in replacing it, and that at the time of the accident of which plaintiff complains the chain had got off this pulley, and one Curry, who was foreman of the defendant, in charge of the work, called upon plaintiff to assist in replacing the chain upon the pulley; that in doing so plaintiff went part way up the slope of the bank from which gravel was being excavated by means of the steam shovel, and was pulling upwards on the chain, assisting other employes in making the chain slack at the top so that it could be replaced on the pulley, when a portion of the top part of the bank which was above plaintiff fell and injured him. The evidence also tended to show that the fall of the portion of the top of the bank which caused the injury was caused, to some extent at least, by the fact that Curry, the foreman, stood there assisting to pull up the chain, another employe being with him in that position for the same purpose, and that the falling down of the bank was also due to the nature of the bank itself, which consisted in part of a stratum of sand below a layer of hard clay, which constituted the top portion; and that the nature of the bank was open to the observation of all the employes who were engaged in the work.

The argument of counsel for appellant is based on the contention that there was negligence on the part of the defendant in two respects: First, that Curry, the foreman in charge of the work, did not cause the steam shovel to be removed to a place which would be a safe one for

replacing the chain on the pulley; and, second, in the act of Curry in standing on the bank above plaintiff, thereby causing a peril to plaintiff in the position which he took in assisting to handle the chain. These two forms of alleged negligence are substantially considered together as constituting a breach of the duty of the defendant to furnish a safe place for the plaintiff to work.

The cases relied upon by counsel for plaintiff are those in which the familiar doctrine is announced that the duty to use reasonable care in furnishing a safe place for the employe is not discharged merely by the employment of reasonably competent persons to make the place safe, but that the employer will be liable for negligence of the employes to whom this duty is intrusted. The cases cited are those in which it is found that the employe has in the course of his employment been called upon to use defective tools or appliances furnished him for the purpose (*Hough v. Railroad Co.*, 100 U. S. 213 [25 L. Ed. 612]; *Hill v. Southern Pac. Co.*, 23 Utah, 94 [63 Pac. Rep. 814]) or to go on or about trestlework, or scaffolding, or staging insufficiently constructed (*Fink v. Des Moines Ice Co.*, 84 Iowa, 321; *Haworth v. Seevers Mfg. Co.*, 87 Iowa, 765; *Smizel v. Odanah Iron Co.*, 116 Mich. 149 [74 N. W. Rep. 488]) or to work in a place attended with peculiar danger known to, or which should have been known to, the employer, and not known to the employe (*Stahl v. Duluth*, 71 Minn. 341 [74 N. W. Rep. 143]; *Pioneer Fireproof Const. Co. v. Howell*, 189 Ill. 123 [59 N. E. Rep. 535]).

But we think that cases of this character have no application to the one now before us. When the employer, or those representing him, has provided a place which is reasonably safe in itself, and has furnished reasonably safe tools and appliances and reasonably competent fellow workmen, then the risk incident to the progress of the work as carried on by the employes is assumed by virtue of the employment, and

1. INJURY to
employe;
assumption
of risk.

for an injury received in the prosecution of the work in such place with such appliances and in connection with such fellow workmen the employe cannot recover from the employer. *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kan. 682; *Ross v. Walker*, 189 Pa. 42 (21 Atl. Rep. 157, 159, 23 Am. St. Rep. 160); *Lindvall v. Woods*, 41 Minn. 212 (42 N. W. Rep. 1020, 4 L. R. A. 793); *Marsh v. Herman*, 47 Minn. 587, (50 N. W. Rep. 611); *Anderson v. Daly Min. Co.*, 16 Utah, 28 (50 Pac. Rep. 815); *Oleson v. Maple Grove Coal & Min. Co.*, 115 Iowa, 74; *Bergquist v. Minneapolis*, 42 Minn. 471 (44 N. W. Rep. 530); *Cleveland C. C. & St. L. R. Co. v. Brown*, 20 C. C. A. 147 (78 Fed. Rep. 970). In determining the liability of the employer under such circumstances it has been well said that the important consideration is "whether the structure, appliance, or instrumentality is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it is of itself a part of the work which they are employed to perform"; and accordingly it was held that, where workmen were engaged in the business of piling lumber, the fact that a defective board was made use of in furnishing a step in the side of the pile, on which one of the employes stepped, thus receiving an injury, did not render the employer liable. *Fraser v. Red River Lumber Co.*, 45 Minn. 235 (47 N. W. Rep. 785).

There has been some conflict in the authorities as to the liability of an employer for the negligent acts of the foreman working with other employes in the prosecution of the work in which they are all engaged, but the rule which has the support of the great weight of authority is that the liability of the employer for the negligent act of the foreman does not depend on difference of rank between the foreman and the other employes, but upon the nature of the act itself—as to whether it is one in connection with which

2. LIABILITY of employe: co-employe: rank: negligence.

the foreman is engaged with the other employes in prosecuting a common undertaking. If he is in fact a co-employee as to the thing done, which is something which might have been done by another employe, then difference of rank is immaterial, and the general rule as to co-employees is applicable. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368 (13 Sup. Ct. Rep. 914, 37 L. Ed. 772); *New England R. Co. v. Conroy*, 175 U. S. 323 (20 Sup. Ct. Rep. 85, 44 L. Ed. 181); *Okonski v. Pennsylvania & O. Coal Co.*, 114 Wis. 448 (90 N. W. Rep. 429); *Deep Min. & D. Co. v. Fitzgerald*, 21 Colo. 538 (43 Pac. Rep. 210); *Knutter v. New York & N. J. Tel. Co.*, (N. J. Err. & App.), 52 Atl. Rep. 565, (58 L. R. A. 808). We have unqualifiedly announced that this is the rule to be recognized and applied in such cases. *Newbury v. Getchel & M. Lumber & Mfg. Co.*, 100 Iowa, 441; *Barnicle v. Connor*, 110 Iowa, 238, *Geesen v. Saguin*, 115 Iowa, 7. In the application of this rule it has been held that, where safe tools and appliances have been provided, the use of an unsafe tool or appliance by an employe at the suggestion of the foreman will not render the employer liable. *Maher v. Thropp*, 59 N. J. Law, 186 (35 Atl. Rep. 1057); *Cleveland C. C. & St. L. R. Co. v. Brown*, 20 C. C. A. 147 (73 Fed. Rep. 970). It is scarcely necessary to add the further suggestion that, where the danger is equally apparent to the employe and the foreman in charge of the work, the employer will not be liable for any failure of the foreman to give warning to the employe with reference to such danger. *Larson v. McClure*, 95 Wis. 538 (70 N. W. Rep. 662).

In view of these well established principles, we have no difficulty in reaching the conclusion that, if the injury was due to the nature of the bank which was being excavated, and which was equally apparent to all the workmen engaged about it, the employer is not liable; that, if the accident resulted from the act of Curry in standing on top of the bank, then his negligence was that of a co-

employe, for at the time he was simply engaged with the other employes in pulling up the chain for the purpose of replacing it upon the pulley; and that as to the contention that the steam shovel might have been removed to a safer place for the purpose of replacing the chain upon the pulley there is no evidence that it was in general unsafe to attempt to replace the chain in such a situation as that where the work was being done, nor that, in the exercise of reasonable care, it was necessary to move the steam shovel or put the crane in a different position every time that the chain came off the pulley or there was similar difficulty in carrying on the work which was being prosecuted.

Finding no error in the action of the trial court, the judgment is **AFFIRMED**.

LEMARS BUILDING & LOAN ASSOCIATION, Appellee, v. GEORGE W. McLAIN AND CLARENCE McLAIN, Appellants.

Building and Loan: LOAN TO WIFE: LIABILITY OF HUSBAND: USURY.

A husband who joins in the execution of a note and mortgage on the wife's property to secure the payment of a loan made to her by a building and loan association of which she was a member, becomes a surety for the payment of the debt according to her contract, and cannot avail himself of the defense of usury.

Appeal from Plymouth District Court.—HON. GEORGE W. WAKEFIELD, Judge.

WEDNESDAY, MAY 20, 1903.

THE opinion states the case.—*Affirmed*.

Martin & Martin for appellants.

Struble & Struble for appellee.

WEAVER J.,—Plaintiff instituted this action in equity to recover an alleged balance due upon a promissory note made by the defendant George W. McLain and his former wife, Ada R. McLain, and to foreclose a mortgage given to secure the same. Ada R. McLain having died before the commencement of the suit, Clarence McLain, her heir at law, is made a party defendant. The defendants severally admit the making of the note and mortgage as alleged in the petition, and aver that the debt thereby represented has been fully paid. George W. McLain, for himself, further answers that he is not, and never has been, a member of the plaintiff association, and that the contract, as to him, is usurious. The court found plaintiff entitled to a personal judgment against George W. McLain for \$501.17, and to a foreclosure of the mortgage, and from this decree the defendants appeal.

The record discloses that Ada R. McLain was the holder of the legal title to the mortgaged property. She became a member of the plaintiff corporation—a building and loan association of this state. She obtained the loan from the association without any competitive bidding, and, according to the usual requirements of such concerns, undertook to pay dues, premiums, interest, and fees; making an aggregate rate of interest much in excess of eight per cent. per annum. George W. McLain signed the note and mortgage given by his wife to secure such loan, but at no time became a member or stockholder in the association. The plaintiff concedes that the loan was usurious under the laws of this state as they existed at the date of the transaction, but claims the benefit of the statutes since enacted by which such contracts were legalized. Code 1897, section 1898; Laws 27th General Assembly, page 32, chapter 48; *I. S. & L. Association v. Heidt*, 107 Iowa, 297. We do not understand appellants to contest this proposition as applied to the contract of Ada R. McLain;

but the point is made that the statute, by its terms, permits building and loan associations to collect such excessive rates from their members only, and, as George W. McLain was admittedly not a member, he may insist upon the defense of usury. If plaintiff were seeking to enforce a loan made to George W. McLain, a nonmember of its organization, the appellants' position would unquestionably be sound. But no loan was made to him. So far as the contract of loan is concerned, he was in no sense a party to it. Ada R. McLain was the borrower, and the contract with her is made, by statute, valid and enforceable. George W. McLain stands simply as surety that Ada R. McLain will perform the valid contract into which she has entered. From the fact that the association could not have made a valid loan of this kind to the husband, it does not follow that the husband may not bind himself as surety for the wife, to whom such loan may lawfully be made. To entitle the member to a loan, the association may properly require him to furnish security; and, if such borrower has not the real estate or other property adequate to that purpose, we can conceive no good reason why the property or signature of a third person may not be accepted by the association. Usury is something which, if it exist at all, inheres in the contract between the lender and borrower; and, if there be no usury as between them, it follows, in the very nature of things, there can be none as between the lender and surety. We have found no decided case directly in point upon the facts presented, but the principle seems self-evident. It has been held, however, that it is within the scope of the powers of a building and loan association to accept mortgages upon the property of a third person to secure loans to members. *Peoples' B. Ass'n v. Billing*, 104 Mich. 186 (62 N. W. Rep. 378); *Juniata B. & L. A. v. Mixell*, 84 Pa. 313. See, also, 2 Beach's Contract Law, section 1214. If, then, a

man may make a binding pledge of his property to secure the performance of a contract between the association and its members, it would seem equally clear that he may also pledge his personal credit by signing the member's promissory note.

The judgment of the district court is **AFFIRMED**.

**THE IOWA CENTRAL BUILDING & LOAN ASSOCIATION v. THE
MERCHANTS & BANKERS FIRE INSURANCE Co., Appellant.**

Insurance: PAYMENT OF LOSS: WAIVER: RIGHTS OF MORTGAGEE.

The assured cannot waive the effect of an arbitration of a loss under a policy of insurance whereby the company elects to pay the loss rather than replace the property, so as to bind a mortgagee to whom the loss was payable.

Appeal from Polk District Court.—HON. CHAS. A. BISHOP,
Judge.

WEDNESDAY, MAY 20, 1903.

ACTION on insurance policy. The defendant appeals.
—*Affirmed*.

Read & Read for appellant.

Maxwell & Maxwell for appellee.

LADD, J.—On the former appeal it was held that a demand for an appraisal of damages occasioned by the fire was under the terms of the policy an election to make payment in money, rather than to rebuild. As that conclusion is irrevocable in this case, and has since been imbedded in legislative enactment, reargument by appellant's counsel seems not only entirely useless, but of doubtful propriety. The original answer averred that "a disagreement occurred as to the value of the property alleged to have been destroyed, and as to the amount of the loss and

damages; and this defendant, under the terms and provisions of said policy, requested that said matter should be submitted to arbitration in the manner provided for by said policy," and that thereupon appraisers were selected. When the cause was remanded an amendment thereto was filed, in which a separate written agreement of Elliott and defendant to arbitrate was set up, containing this stipulation: "It is expressly understood that this agreement and appraisement is for the purpose of ascertaining and fixing the amount of said loss and damage only to the property hereinafter described, and shall not determine, waive, or invalidate any other right or rights of either party to this agreement." Appellant contends this obviated the waiver of the right to rebuild, resulting from the insurer's demand for an appraisement. Perhaps this is so as to Elliott. The entire loss, however, was payable to the Iowa Central Building Association, as mortgagee; and, regardless of what the assured might do under the provisions of the policy, he was not authorized, after the company had elected to make payment in money, to bind the mortgagee by an agreement relieving the insurer from such obligation. The liability of the company had attached, and the entire controversy related not to the essence of, but the performance of, its contract. At the outset it was bound to satisfy the loss in one of two ways; that is, by payment or replacing the property. It chose the former, and thereupon the mortgagee immediately acquired the right to such payment. This it has never abandoned. While the policy may have authorized the assured to arbitrate the extent of the loss, it nowhere conferred on him the power to surrender any of the rights acquired by the mortgagee in the course of the adjustment.—**AFFIRMED.**

BISHOP, O J., took no part.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY v.
DAVID C. SNYDER AND MARY M. SNYDER, Appellants.

Railroads: RIGHT OF WAY: POSSESSION: RIGHTS UNDER A DECREE:

- 1 A decree in a condemnation proceeding granting a railway company an easement for right of way purposes over the land of another has the same force as a deed so far as the right to possession and control is concerned, and any subsequent possession by the land owner, in the absence of a showing that his holding is adverse, is subservient to the rights of the railway company.

Right of Way: DECREE: TERMINATION OF PRIOR AGREEMENTS.

- 2 Where a railway company has acquired an easement for right of way purposes by a decree in a condemnation proceeding which contains no reservations in favor of the land owner, all prior verbal agreements between the parties concerning the use by the land owner of any part of the right of way are terminated by the decree.

Appeal from Lynn District Court.—HON. W. N. TREICHLER,
Judge.

THURSDAY, MAY 21, 1908.

IN 1881 the plaintiff instituted condemnation proceedings for a right of way one hundred feet wide across the land now owned by the defendants, but then owned by their grantor, one Jones. Jones appealed from the award of damages made by the sheriff's jury, and the case appealed was afterwards transferred to the United States Circuit Court for the Northern District of Iowa, where it was finally settled by stipulation, and a decree entered confirming the proceedings and establishing a right of way to a strip one hundred feet wide across said land, described more particularly as "being a strip of land fifty feet on each side from the center line of said railway, as now located thereon, in Linn county, Iowa." The right of way

established by the decree passed in front of the dwelling house on the premises then occupied by Jones, and so near thereto as to take a part of the front yard, in which shade and other ornamental trees were growing. When the road was built, however, no part of the yard was disturbed. It was fenced at the time the proceedings were begun, and when the decree was rendered. Afterwards, when the plaintiff fenced its right of way, it built up to the yard fence on each side, and connected therewith. This was the condition of the fences and the yard when the defendants bought the land, and so it remained until this action was brought. The defendants' deed made no reservation of any of the right of way, and they claim that when they bought they were told by Jones that the right of way did not include any part of the dooryard, because of an agreement with the plaintiff that it should remain undisturbed. In 1895 the plaintiff undertook to extend its right of way fence across the yard on the south line of the condemned strip, and, being prevented from so doing by the defendants, brought this action to quiet its title to the disputed piece of land inclosed within the dooryard fence. The defendants pleaded adverse possession, and averred that the plaintiff had leased the same, with other lands, to a telegraph company, for the use of its poles and wires, and had received a large revenue therefrom; that such use of the right of way created an additional servitude on the land; and that they were entitled to an accounting, and a portion of the rents and profits so received. A demurrer to the cross-petition was filed, but does not seem to have been ruled upon. There was a judgment for the plaintiff. The defendants appeal.—*Affirmed*.

Preston & Moffit for appellants.

J. C. Cook and *H. Loomis* for appellee.

SHERWIN, J.—There is nothing in the defendants' counterclaim. If an additional servitude has been imposed on

defendants' land, it is clear that they have no right to an accounting of the rents and profits received by the plaintiff from the telegraph company.

1. RIGHT of way: possession: rights under a decree.

The appellants claimed, and introduced testimony tending to support the claim, that when the damages were originally assessed, and when the stipulated decree was rendered in the federal court, the injury to the dooryard was expressly excluded from consideration because of the promise made by the plaintiff's agent and attorney that it would never molest or disturb the owners, use thereof; and it is contended that, because of the alleged agreement and understanding, the defendants and their grantors held adversely to the plaintiff under a claim of right, and acquired title thereby to the land in question. The defendants and their grantors have always owned the fee title of the entire right of way, and the plaintiff's interest therein has been an easement only. If the defendants' grantors had conveyed this easement by deed, describing and defining it as was done in the decree, their continued possession of the dooryard for yard purposes, the same as it had theretofore been used, would not set the statute of limitations in motion, for, if the grantor continues in possession after conveyance, he will be regarded as holding in subserviency to the grantee, either as his tenant or trustee, "and nothing short of an explicit disclaimer of the relation, and a notorious assertion of right in himself, will be sufficient to change the character of his possession, and render it adverse to the grantee." 1 Cyc. 1039. The stipulated decree had all of the force and effect that a direct conveyance could have had, and the owner's continued possession of the land thereafter could by no possibility place him in a better position than he would have been in, had he executed and delivered a deed to the plaintiff. While the plaintiff was entitled to the possession and control of its right of way whenever it should deem it necessary to use it in the conduct of its

business, it cannot be said, as a matter of law, that it might not consent to any use thereof which would not interfere with its duties to the public, and we find nothing in the record indicating that the possession or use of the yard by the defendants' grantors was in any way inconsistent with the plaintiff's right of possession or its necessities during the time in question. *Slocumb v. The C. B. & Q. R. Co.*, 57 Iowa, 675.

Nor can the fact that before the final decree there was a promise not to disturb the owner's use of the yard change the rule above announced. The decree settled the parties' rights thereto, and clearly defined what they were, and all prior agreements were merged therein. The plaintiff had the right to rely fully thereon, and to presume that the owner's continued possession of the land was subservient to the easement created thereby. When the defendants bought, they were told that the yard was reserved from the right of way grant, and they continued in the possession and use thereof just as had their grantor. There was no change in the physical conditions, and no outward sign that they were making a greater claim thereto than he had made. Nor did the plaintiff have knowledge of the representations made to the appellants by their grantor. It then had the right to presume that the defendants' possession was subservient to its estate, as had been their grantor's; and unless there was some other unequivocal act on the part of the defendants, brought home to the knowledge of the plaintiff, indicating a hostile intent, their possession was not adverse. We find nothing of this kind in the record. *Slocumb v. The C. B. & Q. R. Co.*, *supra*. True, there was no reservation of the right of way in the defendants' deed, as was the case in *Slocumb v. R. Co.*, but we are unable to see how this can affect the result, for, conceding that the defendants were holding under a good-faith claim of right or title, they have failed to prove that

2. RIGHT of
way: decree:
termination
of prior
agreements.

their possession was adverse to or inconsistent with the plaintiff's right to the land whenever it became necessary for the proper convenience and use of its business.

This is so largely a fact case that we do not deem it necessary to review the cases cited in support of the contention of counsel. The judgment is **AFFIRMED**.

SUSIE BUSBY, Appellant, v. B. C. BUSBY, Executor of The Will of George Busby, Deceased, Appellee.

Estates of Decedents: WIDOW'S ALLOWANCE: FRAUD. The statement of a widow in her application for the allowance of a year's support, alleging that her husband died intestate when in fact he left a will, does not amount to fraud, where the other allegations are substantially correct.

Allowance of Widow's Support. Code, section 8814, contemplates that an allowance shall be made to the widow out of her husband's estate for a year's support of herself and children, even though she may have property in her own right.

Allowance for Widow: APPLICATION TO SET ASIDE: DELAY. Where one of the executors of a will learned of an order making an allowance for the widow shortly after it was made, he cannot have the order set aside on his application filed two years afterwards, because of delay.

Appeal from Linn District Court.—HON. WM. G. THOMPSON, Judge.

THURSDAY, MAY 21, 1903.

THE opinion states the case.—*Reversed*.

Voris & Haas for appellant.

Fitzgerald & Varner for appellee.

WEAVER, J.—George Busby, a resident of Linn county, died testate, April 5, 1899, leaving surviving him his widow, Susan E. Busby, and two minor children, aged, respectively, eight and thirteen years. On September 21, 1899, the widow petitioned the court for an allowance from the estate for a year's support for herself and minor

children, alleging there were cash assets in the hands of the executors to the amount of about \$5,000, and asking to be allowed therefrom the sum of \$900. The court allowed her \$600, which was soon thereafter paid. On October 11, 1901, B. C. Busby, "one of the executors" of the will, presented a petition to the court alleging that the will named J. C. Davis, E. E. Busby, B. C. Busby, and the said Susan E. Busby as executors, who duly qualified for the execution of said trust; that by the will the largest part of the estate was given to the widow and minor children; that the petition for allowance to the widow had been presented by her and said J. C. Davis without the knowledge of the other executors, or notice to "the representatives of the estate" that the petition for the allowance did not fully state the facts; that in truth the widow had in her own right and in her childrens' right a large amount of money, and "it was not necessary that such order be made, and was contrary to the intention of the will," wherefore it is said the allowance was "illegal, unauthorized, and contrary to the provisions and intention of the will"; and asks that the order be set aside, and the widow be charged with said sum, and account therefor as an executor of the will. By an amendment filed February 9, 1902, it is charged that the allowance was procured by fraud and false representations as to the financial condition of the widow. In answer to this petition, Mrs. Busby denies the alleged fraud, asserts her right to receive such allowance, and says that the executor now complaining had full knowledge of all the proceedings, and made no attempt to interfere therewith or to set aside the order for more than two years, and is estopped now so to do. Upon trial to the court, the petition of the executor was granted, the order of allowance set aside, and Mrs. Busby was ordered to account for the sum so received, as a trust fund for the benefit of the estate of her husband. From this judgment she appeals.

I. The charge of fraud is not sustained by the evidence. It is true the petition for the allowance speaks of the husband as dying intestate. Whether this misstatement was by inadvertence or design is immaterial. Her right to the allowance did not depend on whether there was or was not a will in existence. The other statements of the application were substantially correct. While she had received about \$2,000 life insurance, no part of the estate proper was paid to her under the will until the following year. It is not claimed that she overstated the value of the estate. Her representations of what it would require to support her and her children for a year is not to be construed as a statement that she had no resources of her own, but as the reasonable cost or expense of the maintenance of herself and children for that period.

II. The allowance to a widow for a year's support is not a mere charity, to be withheld because she has property of her own by which she could possibly keep herself and children during the first year of her widowhood. The statute, it is true, says the allowance shall be made if "necessary" (Code, section 3314); but this language should have not only a reasonable, but liberal, construction to promote the purpose of its enactment. In the ordinary estate, even when of considerable value, the wife and young children of a deceased husband have during the first year special need of the assistance which this statute contemplates. If there is real estate, the title passes at once to the heirs or devisees in common, and considerable time is required before the fractional shares coming to these helpless members of the family can be made available as a means of support. If there be money or other personal estate, it passes to the administrator, who may not rightfully distribute any part of it until the court directs.

If the minor children have any property in their own right, it also is subject to like delay in being reduced to available form or made productive of income. Moreover, the mother should not be required or allowed to trench upon the infant's property, and particularly the principal fund, except in clear cases of necessity, and time is required for interest and rents to be earned. The situation in which Mrs. Busby was left appears to be substantially such as we have here indicated. The record does not disclose the extent or value of the estate left by the husband, neither does it appear that the widow had any property or means of support except such as she received under the will. By that instrument she was given proceeds of life insurance, \$2,000; the further sum of \$3,000, to be paid one year after the death of the testator; the interest at six per cent. per annum upon the sum of \$5,000 and the use of the homestead—all such benefits to be surrendered to B. C. Busby and another in case of her marriage. Of these items she had received at the date of her application only the life insurance, about \$2,000. The \$3,000 was not due until the end of the year, and the annuity or interest on the \$5,000 would not accrue until the expiration of that period. If she put the \$2,000 at interest, that, too, would require a year before returning anything as income. In other words, she had no income whatever, and during the first twelve months must accumulate a burden of debt for the ordinary necessities of life, or must deplete the principal fund derived from the insurance, and this she should not have been expected to do.

Assuming that the insurance money and the legacy of \$3,000 had been invested in six per cent. securities, the income thus produced added to the annuity provided for the benefit, the entire income obtainable under the will was \$600, none of which, as we have observed, was available until the end of the year. The effect of the order of allowance, therefore, was simply to require the estate to

support the woman and children at this rate during that period. This was neither extravagant nor unjust. The case of *Newans*, 79 Iowa, 32, is directly in point. We there held that an allowance should be made, even though the widow has property in her own right, if her income is insufficient for her support, without resort to the principal fund, and we added: "We do not think she should be compelled to dispose of her property, and thereby destroy her means of support for the future, in order to meet her expenses for the year in question, and thus save an appropriation by the court."

III. As already stated, the order making the allowance was made at the September term of the district court in 1899. The appellee admits that he learned of the ap-

3. ALLOWANCE
for widow:
application
to set aside:
delay.

plication and of the court's order not later than one or two days thereafter, and tells us that he then went to appellant and upbraided her for having procured the allowance, and told her he should charge it against her as a payment upon the cash legacy. By what authority he assumed to override and nullify the judgment of the district court he does not explain. He took no measures of any kind to have that judgment set aside until after a lapse of two years, when this proceeding was instituted, and the alleged fraud appears not to have been thought of as a basis of relief until several months later, when it was added as an amendment to the pleadings. Meanwhile the money has been paid over, and the evidence tends to show it has been expended. Under such circumstances, the appellee is estopped by his own laches to make this complaint, even if fraud was committed (which we do not find), and he is therefore not entitled to the relief demanded. *Harshman v. Slonaker*, 53 Iowa, 467.

For the reasons stated, the judgment of the district court is REVERSED.

120	541
134	162
134	431

COE COLLEGE, Appellant, v. CITY OF CEDAR RAPIDS.

120	541
141	592

Streets: PLAT: DEDICATION OF. The object of a plat is to avoid

- 1 complications in conveying small parcels of land, and where a survey and plat are properly made and dedicated, it amounts to a deed in fee simple to those portions therein set apart for public use.

Same. A plat which fails to designate the corners of lots and

- 2 blocks, the width of claimed streets, to point out the location of a stone as in the street, or name the ground as streets, does not comply with the statute so as to constitute a dedication of the streets.

Streets: JUDICIAL NOTICE. Courts will not take judicial notice

- 3 of the width of streets in a special charter city where they are not established in the charter, but the same is a matter of proof as though the city was incorporated under the general law.

Dedication: EVIDENCE. Intention to dedicate land to a public use

- 4 may be inferred from its shape, dimensions, situation, etc., but the evidence fails to bring this case within the rule.

Practice: SUBMISSION OF CAUSE: AMENDMENT TO ABSTRACT. An

- 5 appeal will be disposed of on the record as presented on the first submission, and an amendment to the abstract filed after a rehearing has been granted will be stricken out on motion.

Street: DEDICATION: DESCRIPTION. A plat of an addition to a city

- 6 is insufficient to establish the dedication of a street where it fails to disclose the lines, corners and dimensions of the land claimed to have been dedicated. The description must be as definite as is required in a conveyance.

Dedication: EVIDENCE. Evidence considered and held insufficient

- 7 to show a common law dedication of a street.

Estoppel. Representations of the agent of a third party, a stranger

- 8 to the title, that the space between certain lots is a street will not estop the owner from asserting title against the claim of a city that the same is a street.

Appeal from Lynn District Court.—HON. H. M. REMLEY,
Judge.

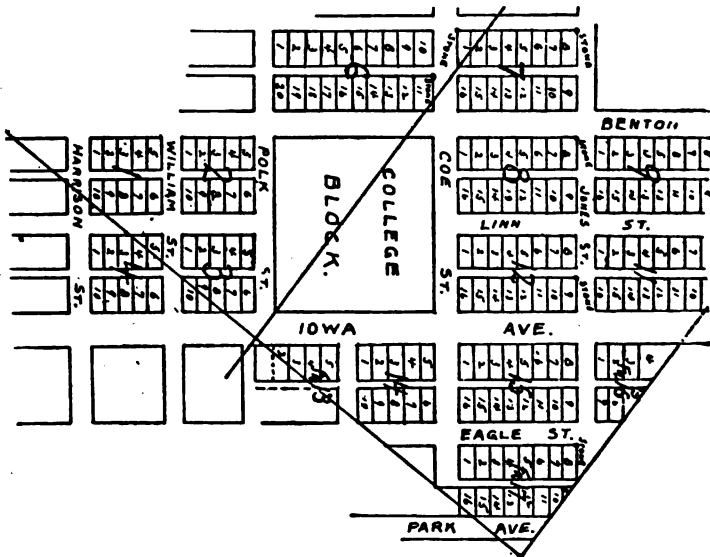
THURSDAY, MAY 21, 1908.

ACTION to quiet title to a strip of land in an addition to the city of Cedar Rapids. The defense interposed was that it had been dedicated as a street and accepted as such by the city. A portion of the plat is annexed. Surveyor's notes were attached stating that certain named streets were continuations of the streets of the same name in the original plat of Cedar Rapids. "Polk street has a set-by at Iowa (First) avenue of sixty feet, as shown on plat, and is eighty feet wide." Some of the lots are sixty feet by one hundred and forty feet, others eighty feet by one hundred and forty feet, and still others one hundred feet wide and three hundred and thirty feet long. "Fractional blocks Nos. 10, 13, 16, and 17 are fractional as shown on plat." All streets save the strip in dispute are designated by some name, and their breadth given. On hearing the petition was dismissed, and plaintiff appeals.—*Reversed.*

Heins & Heins and Deacon & Good for appellants.

J. N. Hughes for appellee.

The following is the plat referred to:



LADD, J.—In 1871 the owners of a tract of land caused it to be surveyed, and map thereof made, acknowledged, and recorded. It was designated "Green and College Addition to Cedar Rapids." Because of alleged defects in the title this dedication was ratified by plaintiff in 1880. That part of the map only which is essential to an understanding of the controversy is set out. The parcel of land in dispute lies between block fourteen and fractional block thirteen. The line crossing block thirteen is the section line, forming the south boundary of the proprietor's land, that below belonging to one Calder, since deceased. The distance from the southwest corner of block fourteen, parallel with its south boundary, is a little less than eight feet. It will subsequently appear that there is nothing to show how far apart the two blocks are. The city of Cedar Rapids, first formally asserted title to the disputed land in October, 1898, by ordering that a street be extended between blocks thirteen and fourteen from First to Second avenues, sixty feet wide, immediately west of block fourteen, that all west thereof to block thirteen be vacated; that the portion vacated below the alley be exchanged with Calder for that within the sixty feet below the section line; and that the portion vacated north of the alley be sold to the owner of lot five in block thirteen for \$600. Thereupon plaintiff began this action, asking that its title to the land be quieted.

The plaintiff's title is conceded in the pleadings, unless lost by dedication to the public as a street. Did the acknowledgment and recording of the map amount to such

dedication of this strip? The Code of 1860,
1. PLAT:
dedication of, under which the ground was surveyed and
platted, allowed the proprietor of a tract of land to make
a plat thereof as therein prescribed. First he must cause
a survey to be made, marking the lots with stakes, and
fixing a stone in a permanent manner in some point in

every street. Second, an "accurate map shall be made of such plat, designating the corners where the stakes are placed and the points where the stones are fixed, and marking and describing the length and breadth of the lots, as well as the breadth and courses of the streets and alleys, and the breadth shall be designated by feet and inches when practicable." Revision 1860, sections 1017, 1018. The acknowledgment and recording of such map is declared to be a deed in fee simple of such portion of the land as is therein set apart for public use. The Code of 1878, under which the dedication was ratified, did not differ materially from that of 1860. In this way numerous and complicated descriptions of land to be conveyed in small parcels are avoided, and the location of each and the intervening streets and alleys clearly exemplified. All are described in one instrument, and by reference to it every subdivision may be found, and the mention of lots or blocks by numbers, or the streets and alleys by name, or some equally explicit designation, becomes as definite and certain as though described by metes and bounds. *Brown v. Taber*, 103 Iowa, 1; *Milburn v. City of Cedar Rapids*, 12 Iowa, 246.

Strict compliance with such statutes ought not to be exacted. But they are to be followed substantially, and by this we mean that the divisions into which the tract of land is separated by the acknowledgment and recording of the map should be pointed out with such precision, and the boundaries so fixed therein, as that these may be certainly and definitely located from the data furnished. Otherwise the object of the statute is not attained, and resort to description by metes and bounds rather than by reference to the map will be essential in the transfer of titles. Ordinarily the map, with the accompanying notes and acknowledgment, must speak for itself, and, as no intrinsic evidence was offered, we are not to look beyond these in the instant case. Lo they

2. SAME:

urnish data pointing out a definite portion of the tract platted? If so, do they indicate an intention to dedicate it as a street? These inquiries must be answered in the negative. With respect to it and fractional block thirteen, the requirements of the statute were ignored to such an extent as to indicate that because of their situation no dedication was intended: (1) Neither the corners of this block nor any lot therein are indicated; (2) the breadth of the disputed strip of land is not given; (3) no point therein marks the location of a stone as in the street; (4) the strip is not named a street; (5) the proprietors could not well make of it a public thoroughfare.

Let us see if there is any sufficient explanation of these omissions and defects. Appellee contends that the width of this strip and the lots in block thirteen may be ascertained by computation. Twelfth street is designated Polk street on the original plat, and has a set-by, according to the surveyor's notes, of sixty feet at First avenue, and is declared therein to be eighty feet wide. But appellee argues that it is a continuation of a street sixty feet wide in the original plat of Cedar Rapids, and hence must have been but sixty feet wide below First avenue. If so, it is said that lot one in said block must be eighty feet wide, the other lots sixty feet each, and this strip eighty feet, thereby explaining the appearance of the map. But the trouble with this arrangement is that there is nothing in the record to indicate that this street was to be a continuation of a street in the original plat, and such plat was not introduced in evidence. As other streets are specifically mentioned as being such continuations, the omission of Polk street as one of them indicates it was not included. But, even if included, the width stated cannot be rejected merely for the purpose of corresponding with a street elsewhere of the same name, supposed to be narrower. Nor will this court take judicial notice of the width of the

streets even in cities organized under special charter. While courts take notice of the incorporation of municipalities by special acts of the legislature and of the territory included, it is because these matters are disclosed by the enactments themselves. See *Hard v. Streets*: judicial notice. *City of Decorah*, 43 Iowa, 318. The streets of Cedar Rapids were not established in its charter, and their width is matter of proof, the same as if in a city organized under the general law of the state. See *Diggins v. Hartshorn*, 108 Cal. 154 (41 Pac. Rep. 283); *Porter v. Waring*, 69 N. Y. 250; 17 Am. & Eng. Ency. of Law, 939.

It is further argued that as the distance from the northwest corner of block fourteen to the northwest corner of block thirteen is but the sixty feet "set-by" greater than the south side of College Block, it must be six hundred and eighty feet, and that as deducting the frontage of the block fourteen leaves but three hundred and eighty feet, this must have been divided into five lots of sixty feet each, and eighty feet left for a street. But what evidence have we that the dedicators so intended? Nothing whatever, save the existence of the lines on the map. In no other respect was the statute followed. An estimate by measuring these lines and comparing with the scale of the map would not furnish reliable data from which to make computation. *Palmer v. Osborne*, 115 Iowa, 714; *Minneapolis & St. Louis Ry. Co. v. Town of Britt*, 105 Iowa, 198. Moreover, a glance at the map indicates that even a measurement of the lines would not produce this result, and show lots to be of the same width.

Nor can the width of the lots or strip, as suggested, be inferred from uniformity in the map; for some of the streets are noted as being of the same breadth as the original plat of Cedar Rapids, said by appellee to be sixty feet, and First avenue is one hundred and twenty feet wide. Some of the lots are sixty feet in breadth, others eighty feet, and still others one hundred feet. Effect should

be given all lines and marks in such a map, if possible but a description ought not to be supplied by mere assumption. Indeed, the entire argument of appellee is based on the assumption that the lots in block thirteen and the disputed strip have their boundaries defined. Of course, the platting of block thirteen is material only as it may aid in settling the question at issue. Certainly the record furnishes no data by which to fix upon the breadth of the ground in dispute. Nor is it marked by a stone. Nor is it designated a street. If stakes were set at the corners when this was done, they are not designated on the map. As said, all of the requirements of the statute are ignored. Of course, land may be dedicated to the public use in a plat without naming such use. But the intention to dedicate must appear, and this may sometimes be inferred from the shape of the land, its situation, dimensions, and the like. *City of San Francisco v. Burr*, 108 Cal. 460 (86 Pac. Rep. 771); *City of Indianapolis v. Kingsbury*, 101 Ind. 200 (51 Am. Rep. 749); *Taraldson v. Town of Lime Springs*, 92 Iowa, 188. But all these are lacking in the present case. Its shape, in so far as indicated by the lines, repels such an inference; for no one would suppose a road would be laid out but eight feet in width at Second avenue, especially when not necessary to furnish access to any legally platted lot. Every other parcel of land dedicated as a street is named both on the map and in the surveyor's notes, and the breadth of each stated. The omission in this surely tends to negative any supposition that it was intended for such use. There is no similar street of which this might be deemed an extension in the city. The land immediately north of the college was platted as a single block.

But appellee argues that the certificate of the district judge attached to the plat precludes the college from asserting any part of it had not been dedicated. Without deciding the point, it is enough to say that no such certificate

was disclosed in the record as originally presented. The

5. PRACTICE: case is to be disposed of on the record as it
 submission of
 cause: amend- was on the first submission, and appellee's
 ment of ab- amendment to the abstract, filed after a
 stract. rehearing had been granted, will be disregarded and
 stricken on appellant's motion. *Iowa City v. Johnson*
County, 99 Iowa, 513; *Parsons v. Parsons*, 66 Iowa, 754;
Nixon v. Downey, 49 Iowa, 166. The claim that this dis-
 puted ground had been so used before the ratification of
 the dedication as to stamp it as a street is without support
 in the evidence. Upon a careful examination of the
 entire record, we reach the conclusion that none of the
 statutory requisites of a valid dedication by platting of
 the land appearing between thirteen and fourteen were
 observed, save the drawing of lines not definitely located,
 and that it was not set apart for the public use. *Minnea-
 polis & St. Louis R. Co. v. Town of Britt*, 105 Iowa, 198.
 See, also *Fisher v. Carpenter*, 33 Kan. 184 (12 Pac. Rep.
 941); *Robinson v. Coffin*, 2 Wash. T. 251 (6 Pac. Rep. 41).

Under the statutes the acknowledgment and recording
 of the plat is to be treated as equivalent to a deed in fee
 simple of the portion of land set apart to the public use.

6. STREET: If so, the description must be as definite as
 dedication:
 description. is necessary to a conveyance. While the east
 boundary of this strip may be ascertained from the map,
 no indication is given of the location of the west boundary.
 That line is not defined, and no data is furnished by which
 it can be fixed. If stakes were driven at the boundaries,
 their location is not indicated on the map, as required by
 the statute. Extrinsic evidence of their existence was
 not offered, and we have no occasion to determine whether
 they were intended as permanent monuments. It may be
 that parts of block thirteen have been sold since, and but
 a space of eighty feet left. This affords no evidence of
 what the plat with the surveyor's notes evidenced an in-
 tention to leave. Conceding a strip eighty feet wide to

be now in dispute, how does that aid in determining the breadth of the land between blocks fourteen and thirteen, according to the plat when it was filed? Especially when no data from which the width of the north side of the latter block may be learned is given. The plat, then, could not have operated as a conveyance of the strip to the city, because it was impossible to ascertain from it what is alleged to have been dedicated. Possibly the proprietors may have thought that land in that locality might be needed as a street in the future in event Calder should plat his land. This is no more than a guess, having no bearing on the issues as to whether there was a present dedication. The mere fact that it does not appear to have been platted as a lot does not justify the conclusion that it was dedicated as a street. It is immaterial for what purpose reserved, so long as the plat and notes bear no affirmative evidence of an intention to dedicate to the public use. Of course, if we might assume the west line of the strip to be defined on the plat, and that Calder was about to plat the land south so as to extend this strip as a street, and that the proprietors had this fact in mind when acknowledging and recording the plat, it would not be difficult to find a dedication as a street. Courts, however, are to take the facts as the record presents them, without imagining or assuming others necessary to work out and support some plausible theory. The statute must be substantially complied with in order to constitute a dedication to the public use, and, for the reasons stated, this was not done with respect to the strip in controversy.

II. As argued by appellee, the lines in a plat may aid in ascertaining a common law dedication. But other evidence is necessary, and that is wanting. That one of plaintiff's trustees supposed, until he had investigated, the strip to be a street, was a mere opinion, not entitled to the slightest weight as evidence in the case. There was nothing in its use to indi-

7. DEDICATION:
evidence.

cate to its owner that the public was claiming it. The laying of a few plank lengthwise in the sidewalk at each end by the city might make crossing more convenient. It did not alone show that people generally traveled over the tract. In 1880 the college conveyed to George Greene "so much of the west half of the northwest quarter of section 22, in township 88 north, of range 7", etc., "as lies southwest of Coe (Fourteenth) street and southeast of Iowa (First) avenue, as shown by the recorded map of Greene & College addition to Cedar Rapids, known as fractional block thirteen (13), containing lots one (1), two (2), three (3), four (4), and five (5), also block fourteen (14), containing ten lots, numbered from one (1) to ten (10), inclusive, and also sub-outlot, corner of Coe and Eagle streets."

On what theory this can be said to show a purpose to dedicate a parcel not included and not made use of by the public is not explained. No more than retention of title is indicated; the purpose is undisclosed. Had the strip been in use for travel, this circumstance might have been important. As it is, the intent to give away the land retained is not to be inferred from the fact of not selling it. If no taxes have been paid, it is because none have been levied. No obstacle appears to have been interposed thereto by the college. There is no evidence that plaintiff or its agents ever represented the disputed strip as a street in the sale of lots or otherwise. The *animus dedicandi* has not been proven.

III The heirs of George Greene partitioned the real estate left upon his decease, and the part described in the deed above mentioned fell to Elizabeth Greene. She conveyed the same to the Cedar Rapids Improvement Company. It may be, as appellee contends, that the college intended to convey the land in dispute to George Greene, though there is no proof from which this might be inferred but a mere intention to convey cannot be construed t

constitute a conveyance. *King v. Dickson*, 114 Iowa, 160.

8. ESTOPPEL. There is some evidence that the agent of the improvement company represented, in selling lot 5, in block 13, and lot 1, in block 14, that the intervening space was a street, and appellee argues that the college is thereby estopped to deny that it is such. It seems needless to say that representations by the agent of a third party, a stranger to the title, could not work an estoppel in favor of the city.—REVERSED.

McCLAIN, J. (dissenting).—The majority of the court concede that a substantial compliance with the provisions of the statute is all that is necessary to render a plat valid, and, in my judgment, the plat in question sufficiently complies with the statutory requirements. It must be understood that what is set out in the majority opinion is only a portion of the plat. It appears from the record that the course of Fourteenth street (the next street northeast of Thirteenth street and parallel with it) is determined by four different stones indicated on the plat, and referred to in the surveyor's notes accompanying the plat and recorded with it. Moreover, the direction of other streets is established by reference to connecting streets in the recorded plat of the city of Cedar Rapids existing at the time this plat was made and filed. There can be no difficulty, then, in determining, as a matter of fact, the courses of the different streets on this plat; for the plat itself and the notes accompanying it give the number and width of lots in blocks eight, twelve, fourteen and fifteen, shown on the portion of the plat copied, and other blocks shown on the original plat as introduced in evidence; so that it is plainly apparent that Thirteenth street is parallel with Fourteenth, and that the strip of land in controversy between block fourteen and fractional block thirteen is parallel as to its northeasterly line with Thirteenth street. The width of the other streets on the plat

is also designated, or easily determinable, from the data given on the plat itself and in the notes accompanying it. The surveyor further recites in his notes that "at the corners of blocks marked 'stone' there is a good substantial stone planted in compliance with the law; at all the other front corners of all the lots there are good substantial oak stakes, well driven; at all the corners of alleys on outside of blocks there are oak stakes, well driven." That in making this statement the surveyor had in mind the lots and alley of fractional block thirteen appears from the recital in his notes that "fractional blocks numbers ten, thirteen, sixteen, and seventeen are fractional as shown on plat." These recitals are made to show compliance with the statutory provisions referred to in the majority opinion. The fact that no stone is shown to have been planted on the lines of the strip in controversy is not significant as to the intention to designate it as a street, for there is the same omission as to other strips which are otherwise clearly described as streets, nor is the failure to give the width in feet and inches controlling as to such intention, for the statute directs that the width shall be given "when practicable." The location of stakes at each front lot corner, as shown on the plat, is just as definitely fixed as by a specific recital as to each stake. That the plat is made in substantial compliance with the statute must, I think, be conceded, and it must therefore be deemed effectual for all the purposes of a plat, so far as the intention of the owner can be ascertained therefrom. This plat, then, shows the strip of land in controversy, with a course determined by the line of block fourteen, and lying between that block and the northeasterly line of block thirteen, by a stake at the northeast corner of lot five (the corner of the block), and another stake at the alley in the middle of the block. The width of this strip is then determinable in two ways: First, by the fact that it appears by the plat to be of the same width as other

streets there described as eighty feet wide; and, second, by the fact that it lies between block fourteen and fractional block thirteen, the lines of which are fixed by stakes in the ground.

We have no question before us as to any possible discrepancy between the width indicated by the lines of the plat and the stakes as set in the ground. If any controversy should arise as to the southwesterly boundary of this strip, it will have to be determined as other questions are determined which depend upon the location of fixed monuments. The stakes placed by the surveyor to mark the boundary of block thirteen were fixed monuments in the same sense as the stones described in the plat and notes. The plat is to be made according to a survey, and is to refer to monuments fixed by the surveyor. It is a map. The lines and figures thereof and the monuments therein referred to represent something, and speak for themselves. See *Taraldson v. Lime Springs*, 92 Iowa, 187. The plat and notes, then, do describe the strip of land in controversy as to its dimensions and location, and this description by monuments would be sufficient to support a conveyance. The only question, then, is whether the method of designation thereof indicates that it is "set apart for public use" in such manner that the filing and recording of the plat "is equivalent to a deed in fee simple" of this strip to the city for a street, as provided in Revision 1860, section 1021. In other words, the controversy now is whether the strip of land which is conceded to exist, and which is marked on the plat as bounded on the northeast by block fourteen, and on the southwest by the so-called fractional block thirteen, and which connects at one end with a street marked on the plat as First avenue, and extends in a southeasterly direction to the limits of the plat, belongs to the city of Cedar Rapids as a street by virtue of a dedication indicated by the plat, or whether, for want of any indication of an intention to dedicate, it is the property of

Coe College. The strip in question is marked on the plat just as other strips which are conceded to be indicated as streets. If the intention of the owner was that it should be held for sale or use in some other manner than as a street, would he not have separated it by some line or mark at the southwesterly end from First avenue, and at the southeasterly end from Second avenue? So far as any lines or marks on the plat are to be considered as of significance, the person who drew it could not more aptly have indicated the intention that the strip in controversy should be a street. The only possible objections to recognizing this strip as a street are that it is not named, and that it does not have full connection at the southeasterly end with Second avenue, which is indicated on the plat as a street with which it should make connection in order to furnish a thoroughfare from Second avenue to First avenue. But, as to the second of these objections, I think that it is of no importance, for the reason that the strip is indicated as a street so far as the territory covered by the plat extends. If the owner of the territory south of that covered by the plat should choose to file a plat of that territory to correspond with this plat, then the strip would be continued as a street, and would fully connect with Second avenue. No further connection than that made was possible in this plat, for the strip extends apparently as a street as far as the plat extends.

As to the objection that the street is not named, I have only to say that that consideration does not seem to me to be controlling. That it might be left to be named at a subsequent time, either by the dedicator or the city, I think too plain to admit of elaboration. In other words, I cannot get away from the position that the plat shows a strip of land designated as a street just as other strips of land in the plat are designated as streets or parts of streets; that the location of this strip is definitely established; and that looking at the plat as a whole, and the

designation of this strip as indicated by the plat, no doubt is left in the mind of any reasonable person that the intention was that this strip should be a street. For these reasons I feel compelled to dissent from the conclusions reached by the majority of the court, and think that the decree of the lower court should be affirmed.

I am authorized to say that Mr. Chief Justice Bishop concurs in the views here expressed.

MRS. ERTEL WILBER, Appellee, v. THE CITY OF FORT DODGE, Appellant.

121	555
122	680
120	555
1125	353

Municipal Corporations. STREET GRADES: IMPROVEMENTS: DAMAGES.

- 1 A property owner making improvements prior to the establishment of a street grade cannot recover damages caused by bringing the street to a grade thereafter legally established.

Grading Streets: RESOLUTION: DAMAGES. Failure of a city council

- 2 to adopt a resolution ordering the work of bringing a street to grade, in the absence of an allegation and proof of special damages on account of such failure, will not create a right of action in favor of a property owner for damages resulting in bringing such street to grade.

Liability of City in Grading Streets: DAMAGES. A city may be

- 8 liable in damages for grading a street, though done in accordance with an ordinance, if thereby the natural drainage is destroyed and no adequate provision is made for disposing of the surface water.

Appeal from Webster District Court.—HON. S. M. WEAVER, Judge.

THURSDAY, MAY 21, 1903.

PLAINTIFF is the owner of lot 1, block 56, original town of Ft. Dodge. Said lot faces east on Eighth street, and is bounded on the south by Third avenue. It extends to the west one hundred and twenty feet to a north and south alley. This action is brought to recover damages to

said lot occasioned by the raising of the physical grade of said street, avenue, and alley. There was a jury trial, and verdict and judgment for plaintiff. The defendant appeals.—*Reversed*.

M. J. Mitchell and Wright & Nugent for appellant.

Kenyon & O'Connor and Healy Bros. & Kelleher for appellee.

BISHOP, C. J.—The petition is in two counts. In the first count, damages in the sum of \$2,000 are claimed on account of the change made by the city in filling the street and avenue by which plaintiff's lot is bounded. Under this count and the answer thereto, the case made is substantially the same as that in *Reilly v. Ft. Dodge*, 118 Iowa, 688. The lot involved in the *Reilly Case* and the lot owned by this plaintiff adjoin, and the street grading, on account of which damages were sought to be recovered by Reilly, was the same general piece of work in connection with the performance of which this plaintiff relies to sustain her cause of action. Excepting the respects immediately to be taken note of, the facts in this case may be ascertained, therefore, by reference to the statement and opinion in the case referred to. Counsel for appellee contend that this case differs from the *Reilly Case*, in that (1) the principal improvements upon the lot of plaintiff were made before the adoption of the ordinance by which the grade of the streets was legally established; (2) in this case it is not made to appear that any resolution authorizing or directing the work of filling the street to the level of the established grade was adopted by the city council prior to the completion of the work.

The first ground of contention may be disposed of by reference to the case of *Kepple v. Keokuk*, 61 Iowa, 653. It was there held that if a property owner makes improve-

ments before a grade for the street is established, he cannot recover damages occasioned by the work of bringing the street to the grade as thereafter legally established. See, also *Farmer v. Cedar Rapids*, 116 Iowa, 822.

As we think, the second ground of contention is not well taken. Counsel for appellant say in their argument that the resolution of date May 29, 1900, which was referred to in the *Reilly Case*, does not appear

1. STREET
grades; im-
provements;
damages.
2. GRADING
streets; reso-
lution; dam-
ages.

in this record, because of an oversight. Be this as it may, the fact that no resolution was

adopted cannot be seized upon as giving a right of action for damages where otherwise no such right could be said to exist. Under the present Code an affirmative vote of two-thirds of the members of the city council, before proceeding with the work of bringing a street to established grade, is not required in terms as was the case under section 465 of the Code of 1878. The cases of *Trustees v. Anamosa*, 76 Iowa, 588, and *Blanden v. Ft. Dodge*, 102 Iowa, 441, cited and relied upon by counsel for appellee, were based upon the earlier statute, and therefore are not controlling as applied to a case arising under the present statute. As we said in the *Reilly Case*, "the failure to adopt a resolution before proceeding with the work amounts, at best, to nothing more than a failure to observe and comply with a matter of form incident to the proceedings to carry into effect a legal right of which the city was already in the full enjoyment." No special damages arising out of the failure to adopt a resolution ordering the work done are alleged or proven, and certainly such failure could not operate to invest the plaintiff with the right to recover damages not referable thereto in any sense. In this case an instruction was given identical with the one quoted in the opinion in the *Reilly Case*. It follows from what we have said that, as applied to the case made under the first count of the petition, the giving of such instruction was error

II. A different question arises under the allegations of count two of the petition in this case. It is there said, in substance, that the grading of the alley at the rear of plaintiff's lot had the effect to dam up a natural water course, and that no adequate provision was made to carry off the water collecting thereon. It does not appear that the alley in question was included, in terms, in the provisions of the ordinance establishing a grade for the street. Whether the adoption of such ordinance had the effect, in legal contemplation, to establish a grade for alleys intersecting the streets named, is a question not presented in the arguments of counsel. Be that as it may, we have held that a city may be liable for damages caused by the grading of a street, even though done in accordance with the provisions of a grade ordinance, if thereby the natural drainage is destroyed, and no adequate means is provided for the escape of surface water. *Ellis v. Iowa City*, 29 Iowa, 229; *Ross v. Clinton*, 46 Iowa, 606; *Morris v. Council Bluffs*, 67 Iowa, 343. So, too, we have said that damages may be recovered in a case where abutting property was injured by grading work done in a street for which no legal grade had been established by ordinance as required by law. *Richardson v. Webster City*, 111 Iowa, 427.

The matters complained of in both counts of the petition were submitted to the jury for one verdict, and we may presume, therefore, that the verdict, as found, was predicated in part upon each of such counts. As the judgment must be reversed because of the matters arising under the first count of the petition, and as the record may not be the same upon a retrial of the action, we express no further opinion upon the questions raised by the allegations of the second count of the petition, as the same appear in the record now before us. It is sufficient to say that, for the reasons pointed out, the judgment was erroneous. It is accordingly reversed, and the cause remanded for further proceedings according to law.—REVERSED.

E. E. CEPRELEY, Appellant, v. THE INCORPORATED TOWN OF
PATON, GREENE COUNTY, IOWA

Defective Sidewalk: SECOND ACTION: PLEADINGS: DILIGENCE. In a second action for injuries caused by a defective sidewalk, brought after a voluntary dismissal of the first, which is barred unless within the exception provided in Code, section 8455, the plaintiff must state facts showing that the dismissal of the first action was not the result of negligence on his part. Allegations of the petition considered and held insufficient to show diligence.

Appeal from Greene District Court.—HON. Z. A. CHURCH,
Judge.

THURSDAY, MAY 21, 1908.

ACTION to recover damages for injuries received by plaintiff by reason of a defective sidewalk. A demurrer to the petition on the ground that the action was barred by the statute of limitations was sustained, and plaintiff appeals.—*Affirmed.*

Gallagher & Graham for appellant.

J. A. Henderson and *Perry D. Rose* for appellee.

McCLAIN, J.—It appears from the petition that the injury complained of was received by plaintiff on the 17th of November, 1900, and that notice of the commencement of a suit to recover therefor was served on the defendant on the 18th day of February, 1901; no written notice specifying the time and place and circumstances of the injury having been served upon the defendant within sixty days, as provided for in Code, section 8447, subdivision 1. An action was therefore commenced within three months from the time of the injury, as required by the

statutory provision just referred to, in case no notice of the injury is given; but on the trial of the cause, October 30, 1901, the plaintiff, at the close of the testimony, and for the purpose of avoiding a directed verdict against him, which the trial judge had intimated he would order, dismissed the action, and subsequently, on January 10, 1902, commenced the present action. As this action, therefore, was not instituted within the time required by the express statutory provision applicable to such cases, defendant's demurrer was rightly sustained, unless the case is within the exception of Code, section 8455, which provides that "If, after the commencement of an action, the plaintiff for any cause, except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first." This second action was brought within six months after the plaintiff failed in the first action, and it is for the same cause of action, and the sole question is whether plaintiff's failure to recover in the first action was due to negligence in its prosecution; the burden being on plaintiff to allege in his petition such diligence in prosecuting the first action as to bring the case within the provisions of this section. It is immaterial, in determining this question, whether plaintiff's dismissal of his first suit was voluntary or involuntary. If involuntary, then the action was determined against him, and the adjudication is final, so that no subsequent action on the same cause of action can be maintained. Code, sections 3764, 3765. If voluntary, then the plaintiff must still allege facts showing that such dismissal was without negligence.

Plaintiff, in his second petition, alleged, as facts showing want of negligence in dismissing the first action, that near the close of defendant's testimony in that action defendant offered evidence tending to prove negligence on the part of plaintiff, in that plaintiff, who attempted

to use the walk in a dangerous place in the dark, was offered the benefit of a light in passing over the sidewalk in question at the time of the injury, and declined such offer, which evidence plaintiff could not have anticipated, and that plaintiff could have contradicted and disproved such testimony by three persons, not named, by whom he could have conclusively shown that the party who the witness stated offered the light to plaintiff was at another and different place at that time; so that it was physically impossible that any such offer could have been made by such person; that these three witnesses were, one of them forty miles distant from the place of trial, and the others about seventeen miles distant, and that it was impossible to have them present at the trial; and that these witnesses were the only ones who knew the fact, so far as plaintiff could ascertain. Plaintiff further alleges that the last witness for defendant gave testimony tending to prove that plaintiff had stated to him, in a conversation in which others were present, that plaintiff had thought of the danger in crossing the sidewalk before attempting to do so, and had thought of leaving the sidewalk and going into the street, and that plaintiff did not then know who the persons were who were present at such conversation, and could not, therefore, meet such testimony, and that plaintiff can now produce witnesses who were present at the conversation referred to, and by whom he can show that no such conversation was had.

We think the showing of diligence is not sufficient. If the desired witnesses could have been discovered and produced within a reasonable time, and with but slight delay in the trial of the cause, no doubt the trial court would, on application, have granted time to get them. If plaintiff could not have secured these witnesses in time, he should have asked for a continuance. Diligence required that the plaintiff should have endeavored in one of these two

methods, or in any other way open to him, to avoid the necessity of dismissing his action. *Pardey v. Mechanicsville*, 112 Iowa, 68. There is no allegation in the petition in the present case that any effort whatever was made to discover the desired witnesses or secure them, nor are any facts alleged which show that it was impossible to do so.

It seems to us that this disposes of the whole case, and the action of the trial court in sustaining defendant's demurrer and rendering judgment against the plaintiff is **AFFIRMED.**

B. SACHRA, Appellee, v. THE TOWN OF MANILLA, Appellant,

Municipal Corporations: AMENDMENT TO PETITION: NEW CAUSE OF

- 1 **ACTION: LIMITATION.** In an action for an injury caused by a defective sidewalk, an amendment to the petition alleging merely that the accident occurred at a different place from that originally pleaded is not the introduction of a new cause of action; and though filed more than ninety days after the alleged injury it relates back to the date of the original petition and the cause of action is not therefore barred.

Evidence: CONCLUSION OF WITNESS. An ordinary witness should

- 2 state only facts, and an inference or conclusion as to what the witness did should be stricken out.

Evidence: EXPERT TESTIMONY. Experts, as a rule, cannot give an

- 3 opinion as to the proximate cause of an injury. What caused the injury is for the jury to determine, but what may or may not have caused it is the subject of expert testimony.

Contributory Negligence. The fact that the party injured by a

- 4 defective sidewalk knew that the walk was out of repair, does not as a matter of law render him guilty of contributory negligence.

Damages: MEDICAL SERVICES: INSTRUCTION. In an action for

- 5 injuries the plaintiff is entitled to recover as damages the reasonable value of the medical services performed, but where there is evidence of the amount of the physician's bill, an instruction that he may recover "such sum as will compensate him for money expended and liability incurred for medical treatment" may be sustained.

120	562
122	565
122	642
120	562
124	182
124	751
120	562
125	414
120	562
131	739
120	562
135	214
120	562
138	28
138	291
138	298
138	406

Damages: **LOSS OF TIME:** **INSTRUCTION.** In an action for personal
6 injuries, an instruction that plaintiff should be allowed the
value of his time while disabled is more favorable than defendant is entitled to, as he is entitled to compensation for loss of time while only partially disabled.

Evidence: **LOSS OF TIME.** Evidence in an action for injuries received by a defective sidewalk examined and held sufficient to
7 take the case to the jury on the question of damages for loss of time.

Appeal from Crawford District Court.—HON. Z. A. CHURCH, Judge.

THURSDAY, MAY 21, 1908.

ACTION at law to recover damages for personal injuries received by plaintiff while passing along and over a sidewalk in the defendant town. Trial to a jury. Verdict and judgment for plaintiff, and defendant appeals.—*Affirmed.*

Salinger & Korte for appellant.

J. P. Conner and *C. C. Cole* for appellee.

DEEMER, J.—The original petition, which was filed within forty-seven days after the accident, alleged that defendant maintained a sidewalk on the north of Sixth street, and that plaintiff, while walking thereon, and passing from the Methodist Church to his home thereon, received the injuries of which he complains. In an amendment to the petition, which was filed more than ninety days after plaintiff received his injuries, he struck out the word "street," in the petition, and inserted the word "avenue"; making the petition read "Sixth avenue," instead of "Sixth street," as originally stated. Defendant pleaded the bar of the statute to the amendment to the petition, based on the fact that it was not filed until

more than ninety days after the alleged injury. Defendant asked the court to instruct that the action was barred. This it refused to do, but, on the contrary, charged that

1. **AMENDMENT** to petition;
new cause
of action;
limitation. the jury should not consider defendant's plea of the statute of limitations. This raises the first point for our determination, and, if decided adversely to defendant, will settle another proposition relied upon by it. A statement of facts seems necessary to a correct understanding of the point presented for decision: In defendant town there is a street known as "Sixth Street," running north and south, and another known as "Sixth Avenue," running east and west. The Methodist Church is on the north side of this avenue, as also is plaintiff's house, which is three or four blocks westward of the church. The amendment to the petition charged that the accident occurred on Sixth avenue, instead of on Sixth street. If it introduced a new cause of action, then it is barred, unless the original petition be treated as notice to the city, under the provisions of section 3447 of the Code, requiring the service of a written notice on the town, specifying the time, place, and circumstances of the injury, within sixty days from the happening thereof. The subject of amendments is dealt with by our Code (section 8600), which provides, in substance, that the court may permit a party to amend a pleading "by striking out the name of a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading to the facts proved."

The uncontradicted evidence shows that the attorney, who drew the petition used the word "street," instead of "avenue," by mistake, and it is apparent that no new cause of action was intended to be introduced by the amendment to the petition. Without evidence, there should be no doubt, in view of the record before us, that

the amendment was offered to cure a mistake, and not to change the cause of action, or to introduce a new one. The place of accident was not changed by the amendment, and no new grounds of negligence were introduced. The amendment came strictly within the language of the statute. Where a mistake in the name of a party is corrected, it is held that no new cause of action is introduced. *Dixson v. Dixson*, 19 Iowa, 512. And we think that, where made to cure a mistake as to the place of accident, the same rule should obtain. Where an amendment is germane, and does not introduce a new cause of action, it relates back to the date of the original petition, and, for the purpose of the statute of limitations, is regarded as a part thereof. *Mather v. Butler County*, 16 Iowa, 59; *Carnegie v. Hulburt*, 70 Fed. Rep. 209 (16 C. C. A. 498); *Youngerman v. Long*, 95 Iowa, 185. That the amendment did not introduce a new cause of action, see *Ball v. K. & W. R. R.*, 71 Iowa, 306; *Myers v. Kirt et al.*, 68 Iowa, 124; *McCracken v. R. Co.*, 91 Iowa, 711; *Kimball v. Bryan*, 53 Iowa, 632. Authorities from other states are not wanting on these propositions. See *Smith v. Bogenschutz*, 14 Ky. 305 (19 S. W. Rep. 667); *Kansas Co. v. Salmon*, 14 Kan. 512; *South v. Bees*, 82 Ala. 340 (2 South. Rep. 752); *Stevens v. Hewitt*, 30 Vt. 263; *Heneshoff v. Miller*, 2 Johns. 295; *Smith v. Palmer*, 6 Cush. 513; *Daley v. Gates*, 65 Vt. 591 (27 Atl. Rep. 193); *Leeds v. Lochwood*, 84 Pa. 70. *Box v. C. R. I. & St. P. R. R.*, 107 Iowa, 660, is not in point. In that case a new and distinct cause of action was introduced, and the amendment was not for the purpose of correcting a mistake. It introduced a distinct and separate cause of action. That is not the case here. The amendment we are considering simply changed the name of the street where the injury is said to have occurred, and was filed to correct an evident mistake. While the place where the accident occurred was material to the cause of action, a change of description, to cure an oversight or

inadvertence, did not introduce a new cause of action. Moreover it is perfectly manifest that the change was made to correct a clerical mistake. *Rau v. Minnesota Val. R. Co.*, 18 Minn. 442 (Gil. 407) is directly in point. There is no pretense that the defendant was in any way misled. Indeed the petition describes the place of the accident in such a manner that there is no ground for any such contention.

II. The following extract from the record shows the next matter complained of: "Q. You warned your husband to be careful? A. I did. I didn't warn him quite quick enough. Q. You did your best? A. I did. But you know what a man is. Q. Were you not afraid when you started to church that the walk was just as bad as then? Why didn't you warn him then? A. I probably did. It was dark when we started to church. Q. And there was as much reason for warning him then as there was when you came home? A. Yes, sir." This evidence was elicited on cross-examination, and, some time after it was received, plaintiff moved to strike out that part of it which related to what the witness probably did. The motion was sustained, and of this defendant complains. There was no error in the ruling. An ordinary witness should state facts, and not mere inferences or conclusions. Whether or not she warned her husband was a fact, and not an inference from other facts; hence there was no error in striking out her answer. Moreover, the ruling, even if error, was without prejudice, for that the witness stated at another time that she warned her husband as to the condition of the walk before he received his injuries.

Witnesses were permitted to give the names of streets as shown on the town plat. This was surely competent.

These questions and answers show the next rulings complained of: "Q. What do you say about a person being able to injure or strain himself by falling, or starting to fall, and catching hold of a corn-crib and jerking him-

self—being able to produce this? A. I should think it was possible. Q. What do you say about the injury in fact having been such an injury that it might have resulted from a wrench or strain of the hip or parts? A. I think it could. Q. Suppose that a man was walking along the sidewalk, and suppose that he stepped with his left foot into a hole on the sidewalk, and as he stepped he reached out and caught his right hand upon a corncrib, then reached and held onto his wife, who had hold of him, and sunk down, but not entirely down, on the sidewalk; what do you say that, in such a condition as that, he might have wrenched himself? A. It might have caused the injury he complained of. Q. How might the injury which you have found have been produced? A. It might have been produced by wrenching of the leg.” All these questions were objected to as incompetent and not a proper subject of expert testimony. In *State v. Rainsberger*, 74 Iowa, 204, counsel, after framing a hypothetical question regarding the body of the deceased, the character of the wounds, and other matters, asked a physician how the wounds upon the person were probably made. This was held incompetent for the reason that “it sought for an expression of opinion based upon matters which were to be weighed and considered by the jury, and determined by the exercise of their own judgments, and not upon the opinion of another. The matters upon which the question was based were not peculiarly within the knowledge of the witness, or the profession to which he belonged.” The questions there presented are quite different from the ones we now have. Experts cannot, as a rule, give an opinion as to the proximate cause of an injury, as that is for the jury. But they may testify as to the probable causes of a given effect. *Moyer v. R. R.*, 98 N. Y. 646; *State v. Knight*, 48 Me. 1; *Com. v. Piper*, 120 Mass. 185. What in fact causes a wound or injury is a question for the jury, but what might or might not have

3 EVIDENCE:
expert testi-
mony.

caused it is a matter of expert testimony. Rogers on Expert Evidence (2d. Ed.) page 128. This is the point of distinction which appellant's counsel has overlooked. The ruling is sustained by *State v. Seymour*, 94 Iowa, 705; *State v. Porter*, 84 Iowa, 181; *State v. Morphy*, 38 Iowa, 270; *Armstrong v. Ackley*, 71 Iowa, 76.

III. Next it is argued that plaintiff failed to show himself free from contributory negligence. While it is no doubt true that plaintiff knew the condition of the walk, which was badly out of repair, yet he should not, from that fact alone, be held guilty of contributory negligence, as a matter of law. This proposition is too well settled to require the citation of authorities in its support. But see *Kendall v. City of Albia*, 78 Iowa, 241; *Barnes v. Town of Marcus*, 96 Iowa, 675. The case was clearly for the jury.

IV. Plaintiff, in his petition, asked damages for loss of time, and for medical expenses incurred on account of being compelled to employ physicians. The court instructed that "he is entitled to recover, if at all, only what are called 'compensatory damages'; that is, such a sum as will compensate him for injuries sustained. In estimating such damages, if you find that he is entitled to recover them, you will allow, first, such sum as will compensate him for money expended and liability incurred for medical treatment of the injuries received; second, the value of his time during the time that he has been disabled by the injuries. These elements of damages are susceptible of being proven by direct evidence, and you are only to allow such sums as have been proven." It is said that the rule given by the instruction is wrong, for that plaintiff was only entitled to recover the reasonable value of the expenses incurred, and for the further reason that there was no evidence on which to base such an instruction. The instruction is not happily worded. Strictly speaking, it is the reasonable value of the

4. CONTRIBUTORY negligence.

5. DAMAGES: medical services: instruction.

medical service performed, which plaintiff may recover. *Bowsher v. Ry. Co.*, 118 Iowa, 16. But in *Flanagan v. Ry. Co.*, 83 Iowa, 639, an instruction similar to the one now in question, regarding expenses for medical services, was approved. See, also, *Lampman v. Bruning*, 120 Iowa, 167. There was evidence that the services of one physician were worth \$100, and that another's bill was not larger than \$20. This was sufficient to justify the instruction.

The instruction as to time lost did not, as counsel contend, permit the jury to award plaintiff for value of time when not disabled, but clearly says, first, that the

6. DAMAGES: damages must be compensatory; and, second,
loss of time: instruction. that plaintiff should be allowed the value of
his time during the time he was disabled. This was, perhaps, more favorable to defendant than it was entitled to. Plaintiff might recover for loss of time when but partially disabled, or while earning something less than he could have earned, had he not received the injuries.

As to the evidence on this point, plaintiff testified that prior to receiving the injuries he was running a well machine, and getting an average of \$5 per day; that he

7. EVIDENCE: had not been able to do any physical labor
loss of time. since he was hurt, and had not worked more than six or eight days. He also testified that he was not able to carry on business with help until November, which was some nine months after the injury, and that (quoting from the testimony) "averaged about five dollars a day with my well machine. I don't know how much I myself earned. Since I am hurt, I earn the difference that I have to give to the extra man. I hire part at a dollar, and part at a dollar and fifty." Plaintiff's wife testified that he had not been able to work since he received his injuries. Surely there was sufficient evidence to take the case to the jury on the question of plaintiff's loss of time. As supporting this conclusion, see *Kendall v. City*, 73 Iowa, 241.

There is no prejudicial error in the record, and the judgment is **AFFIRMED**.

CHARLES J. NEWCOMB, Appellant, v. THE OGDEN PLOW
COMPANY, MERCHANTS' NATIONAL BANK OF CEDAR RAPIDS,
IOWA, AND C. D. HARRISON.

Land Contract: REVOCATION. A contract for the purchase of real

- 1 property entered into between plaintiff, the owner of the
property and also the holder of a certificate of sale thereto,
whereby plaintiff is to acquire full title from the other parties,
is revoked by the transfer of the certificate of sale to
another who acquires a deed thereunder, the consideration for
which is claimed by the owner, and may be cancelled at the
suit of the plaintiff.

Same: LIABILITY OF VENDEE. Where the vendor by his own act,
2 though indirectly, places it beyond his power to pass title
according to his contract, the vendee is not liable for the purchase
price though in default in the payment of taxes.

Appeal from Cedar Rapids Superior Court.—HON. T. M.
GIBBERSON, Judge.

FRIDAY, MAY 22, 1903.

ACTION to secure the cancellation of a contract between the plaintiff and defendants the Ogden Plow Company and the Merchants' National Bank for the sale by the plow company to plaintiff of certain real estate belonging to the plow company, on which the bank held a certificate of purchase at execution sale on an indebtedness due to it from the plow company. Plaintiff also asked cancellation of a note given to the plow company for the purchase price of the premises, and a mortgage upon other property securing payment thereof, and that the mortgage be satisfied of record. The plow company, by cross-petition, asked judgment for damages against the bank for having transferred its certificate of purchase to defendant Harrison, thereby depriving the plow company of its right to redeem the property in pursuance of the agreement entered

into between the plaintiff, the plow company, and the bank, and praying that in the event it shall be found that the right of the plow company to redeem said property from the bank and from said Harrison has been cut off by transfer of the certificate by the bank to said Harrison, and by the acquisition of a title to the property by said Harrison under the sheriff's deed, free from the right of the plow company to make redemption in pursuance of the contract, so that the contract for the sale of the property to plaintiff cannot be specifically performed, judgment be rendered in favor of the plow company and against the bank for the value of the property, less the amount due from the plow company to the bank. The trial court held that Harrison and his grantees took title to the property free from any right of the plow company to make redemption, and rendered judgment in favor of the plow company against the bank for \$1,820.50, as loss and damage accruing to the plow company by reason of the failure of the bank to properly care for and protect securities placed with said bank to secure the indebtedness of the plow company, to wit, the contract of sale above referred to of the plow company to plaintiff, and the certificate of purchase upon execution sale of said property, and further found that plaintiff was not entitled to the relief prayed for in his petition. Plaintiff appeals.—*Reversed*.

W. L. Crissman and J. A. Reed for appellant.

C. S. Smith and Deacon & Good for appellee Ogden Plow Company.

McCLAIN, J.—The contract between the three parties, the plaintiff, the plow company, and the bank, provided for the conveyance by the plow company to plaintiff of the premises in controversy, for a consideration of \$8,200, payable in certain installments, with the condition that, in the event of default on the part of plaintiff to make

any of the payments specified in the contract, either the plow company or the bank might declare the contract forfeited, and the plaintiff should have no right to recover back any payments made, the same to be treated as and for rent for said premises, the effect of such failure being to make the contract a lease; and, as between the plow company and the bank, it was agreed that the bank should continue to hold its certificate of purchase of the property on executor's sale against the plow company, or a deed which it might take for the property in pursuance of the certificate of purchase, as security for the indebtedness of the plow company to it, so long as the payments specified in plaintiff's contract of purchase were made in accordance with the terms of such contract, which was thereby assigned to the bank, with the provision that the payments specified therein should be made to it. The note given by plaintiff to the plow company for the purchase price specified in the contract was also assigned to the bank, and with it the mortgage upon other property of plaintiff to secure the payment of such note. It appears that plaintiff made some payments under the contract to the bank, and that, under the provisions of the contract, he has no right to recover from the plow company any sums of money thus paid, and, on the other hand, that if the plow company has no longer any right of action against the plaintiff, to compel him to pay the remainder of the purchase price stipulated for in the contract, then the contract and the note and mortgage should be canceled, as prayed by plaintiff.

The sole question to be determined, therefore, is whether the right of the plow company to enforce payment of the balance of the purchase price, as against plaintiff,

has been in any way lost or extinguished. Counsel for the plow company do not question the correctness of the proposition advanced by counsel for plaintiff, that only the plow company or the bank could take advantage of the provision in the contract for

1: LAND con-
tract: revo-
cation of.

forfeiture, and that if a forfeiture has not been declared, or has not resulted from any act of the plow company or the bank, then the plaintiff remains liable under his contract; and, on the other hand, the proposition is not controverted, that if, without the fault of the plaintiff, the plow company and the bank have become unable to carry out the contract to convey the premises on payment of the balance of the purchase price by the plaintiff, then there can be no recovery, as against the plaintiff, of the unpaid portion of the purchase price. Counsel for plaintiff insist that by the action of the bank in transferring the sheriff's certificate on the property to Harrison, and the acquisition by Harrison of title to the property by a sheriff's deed issued on the maturity of this certificate, it has become impossible for the bank and the plow company to perform the contract, and therefore that it is no longer binding upon plaintiff. One contention for the plow company is that before Harrison took an assignment of the sheriff's certificate from the bank, he had already acquired a tax title to the premises under a sale for taxes which the plaintiff had agreed to pay, and that the inability of the plow company and the bank to make conveyance is due to plaintiff's own fault in failing to pay such taxes. However this may be, it appears that the bank did actually transfer its sheriff's certificate on the property to Harrison for a consideration of some \$1,800, and that the plow company has claimed the benefit of this consideration, so that it has recognized the fact that the power of the bank and the plow company to make conveyance under the contract above referred to was materially impaired by the act of the bank in transferring such certificate. It does not follow that if no such transfer had been made, and Harrison had not secured a sheriff's deed, he would have been able to maintain his title to the premises as against any claim of plaintiff. The act of the bank in transferring the sheriff's certificate, and of the plow company in insisting

upon the benefit of such transfer, certainly operated as a revocation of the contract to convey to plaintiff; and neither of these parties can now say that they are ready and able to perform the contract, and that plaintiff is liable for the balance of the purchase money.

The contention of counsel for the plow company that its judgment against the bank was only for the value of the property, of which it was deprived by the act of the bank in not continuing to hold such property as security, subject to the plow company's right of redemption, and therefore that, while plaintiff is entitled to credit to that extent on the purchase price of the property, as provided for in the contract, he remains liable for the unsatisfied balance to the extent of some \$500, is manifestly unsound. It assumes that plaintiff may be compelled to pay the full purchase price of this property, without any possibility of securing title thereto. Title has irrevocably passed from the plow company and the bank, and that too, as we have seen, by reason of the act of the bank itself, and not merely through failure of the plaintiff to redeem from sales for taxes which he was under obligation to pay. In order to avail itself of the claim that the inability to make title under the contract was due to plaintiff's default in payment of taxes, the plow company should show that through such default alone did an adverse title accrue to Harrison. This it did not and could not do.

We reach the conclusion that by the act of the bank in parting with the sheriff's certificate, under which it held the property as security for the plow company, and the act of the plow company in insisting upon and recovering for its own advantage the consideration received by the bank for such conveyance, the plow company has become completely estopped from collecting any unpaid portion of the consideration provided for in the contract with plaintiff, and represented by the note with mortgage

2. SAME: liability of vendee.

security, as already described, and that the contract, the note, and the mortgage should be canceled and declared no longer of any validity, and, further, that plaintiff is entitled to have the mortgage satisfied of record in the county where the property is situated on which such mortgage was given. Plaintiff can have such a decree in this court, at his election, or he may have the case remanded to the lower court for a proper decree.—REVERSED.

J. M. KILMER, Appellant, v. D. W. GALLAHER.

120	575
144	153

Attachment. ACTION ON BOND: TAXATION OF ATTORNEY'S FEES. In

1 an action on an attachment bond, the taxation of attorney's fees is limited by Code, section 8887, to fees earned at the time judgment is rendered in the district court; neither the district nor the appellate court has any authority to tax fees for the prosecution of an appeal.

Same. In an action on an attachment bond defendant recovered

2 a verdict which never went to judgment by reason of an unauthorized settlement made by one of his attorneys. On a retrial of the case, after reversal on appeal, the trial court refused to allow attorney's fees for services on the first trial as part of the damages on the attachment bond. Held, not an improper exercise of the trial court's discretion.

Appeal from Harrison District Court.—HON. N. W. MACY, Judge.

FRIDAY, MAY 22, 1903.

THE plaintiff sued on a note and attached the defendant's property. The defendant counterclaimed on the bond and recovered a judgment thereon against the plaintiff. Both parties appeal. The plaintiff will be termed the appellant.—*Affirmed.*

No appearance for appellant.

H. L. Robertson, W. H. Killpack and Bolter & Bolter for appellee.

SHERWIN, J.—The appellant has filed no argument, and his appeal is therefore dismissed. This case has been twice tried in the district court, and this is the second appeal to this court. The first trial below resulted in a verdict for the defendant, but, before a judgment was rendered thereon, one of the defendant's counsel agreed to a settlement of the case whereby a judgment was rendered against the defendant on the note, and against the plaintiff for an attorney's fee of \$75. The settlement was held invalid by this court (see *Kilmer v. Gallaher*, 112 Iowa, 588), and upon a retrial of the case in the district court the defendant was allowed an attorney's fee of \$150, but the court credited thereon the \$75 paid to the defendant's attorneys under the former judgment. Section 8887 of the Code is

1. ATTACHMENT; the only statute we have permitting the
action on
bond: attor- taxation of an attorney's fee as a part of the
ney fees: tax-
ation of. costs which may be recovered in a suit on an
attachment bond, and without this statute no such fee
could be allowed. *Vorse v. Philipps*, 87 Iowa, 428. That
such fee, when allowed, is to be taxed as a part of the
costs, is held in *Weller v. Hawes*, 49 Iowa, 45; *Union Mer-*
cantile Co. v. Chandler, 90 Iowa, 650. The only authority
given the district court by this statute is to allow a rea-
sonable fee for the prosecution of the action in that court.
It does not permit the court to allow an additional amount
for the prosecution of, or defense to an appeal to this
court, because to so hold would give that court the power
to determine what costs on appeal should be paid by either
party, which is a matter exclusively within the jurisdic-
tion of this court, except where otherwise provided by
law. Furthermore, the language of the statute clearly
shows that the allowance is to be limited to the fee earned
at the time final judgment is rendered in the district
court, for it is a part of the costs which follow the trial
and determination there that the attachment was wrong-

fully sued out. This being true, the district court properly refused to allow the appellee an attorney's fee for the prosecution of the former appeal. Nor does the statute under consideration authorize this court to allow a fee for the trial of such cases here, and no case has been called to our attention which holds that we have such power.

On the last trial of the case the court refused to allow the defendant an attorney's fee for the first trial, and of this complaint is made. We are not disposed, however,

2. SAME. to interfere with this ruling. The law provides that the attorney's fee shall be fixed by the court, and that it shall be reasonable. It cannot be said that the language used compels the court to tax any fee which the testimony may show to be reasonable, regardless of its own conception of such reasonableness after having heard the case tried, because such a construction would deprive the court of all discretion in the matter, while the statute itself manifestly intends to give such discretion. Upon the original trial the defendant obtained a judgment against the plaintiff, the benefit of which he lost through the action of one of his attorneys, and without any fraud or collusion on the part of the plaintiff. The second trial resulted from that action, and it would be a manifest injustice to compel the plaintiff to pay for the services of an attorney which were rendered entirely useless without fault on his part. What we have said on the last point applies also to the contention that the \$75 paid to the defendant's attorneys under the settlement should not be credited on the amount allowed on the last trial. The money was paid in pursuance of a settlement which the plaintiff might well presume the defendant's attorneys had authority to make. The settlement and the judgment rendered thereon were repudiated by the defendant, and shown to be without his authority, but the money paid to the attorneys they still retain; and surely,

when he asks that he be allowed compensation for those attorneys, it is but just that the amount already paid to them for their services to him be deducted from the amount so allowed.

The defendant's motion for an allowance on this appeal is disposed of by what has already been said, and must be overruled. The motion for damages under section 4141 of the Code is sustained, and the amount thereof fixed at \$15.

The judgment is **AFFIRMED**.

J. H. KIRCHER, Appellee, v. THE INCORPORATED TOWN OF LARCHWOOD, Appellant.

Streets: EVIDENCE OF. In an action for injuries sustained by
 1 reason of a defective sidewalk, it is sufficient to show that the way had been used by the town for many years as a public thoroughfare and that the town had assumed and exercised control over it, to fix its character as a public street.

Pain and Suffering: PLEADINGS: EVIDENCE. In an action for an
 2 injury caused by a defective sidewalk, the plaintiff, under a general allegation that by reason of the injury he suffered great bodily pain, may show that his kidneys had become somewhat affected by his confinement.

Special Damages. Special damages are such as do not ordinarily
 3 result from a given cause, and to be recovered must be pleaded.

Evidence: APPLICATION OF: INSTRUCTION. Where evidence is ad-
 4 missible for a certain purpose, the fact that the court in the absence of a request does not limit its application by an instruction, is not prejudicial error.

Permanent Disability: EVIDENCE: INSTRUCTION. In an action for
 5 injuries arising from a defective sidewalk, the plaintiff alleged that the injuries were permanent and was permitted to show his expectancy of life on the statement of counsel that no claim for permanent injury was made but that the evidence was offered to show that plaintiff would probably outlive his disabled condition. *Held*, error to submit the question of plaintiff's permanent disability, and that the error was not waived by failure to request an instruction.

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 1123 10
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 1129 555
 120 578
 140 426

Appeal from Lyon District Court.—HON. WM. HUTCHINSON,
Judge.

FRIDAY, MAY 22, 1908.

ACTION for damages on account of a personal injury occasioned, as alleged, by a defective sidewalk. There was a jury trial, verdict and judgment in favor of plaintiff, and defendant appeals.—*Reversed.*

E. Y. Greenleaf for appellant.

Parsons & Riniker for appellee.

BISHOP, C. J.—To prove that the way upon which the sidewalk in question was located was a public street, the plaintiff offered in evidence the county records showing the location of a county road along the line of such street as alleged; also the oral testimony of several long-time residents of the town to the effect that the way had been open, worked, and used as a public street for many years. This evidence was objected to by the defendant, and it seems to be the contention of counsel that, because the existence of the street was denied in the answer, the plaintiff was bound to prove the fact in all strictness,—even as the town might be bound to prove the same to establish authority over or title thereto. We do not understand that this is required. It is true that, to hold the defendant liable, it must be made to appear that the accident complained of happened upon a public street or highway within the corporate limits of the town. But it need not appear that all the formalities incident to laying out a street or highway, or incident to the dedication and acceptance thereof, have been complied with according to the letter and spirit of the law relating to such subjects. It is enough if it appears that the stretch of ground was open, and used as a street, and that the

1. STREETS: evidence of.

town had recognized it as such, and had assumed and exercised control over the same. The right of the town so to do might be defeated in a proceeding brought for that purpose; but while it continues to hold out the way as a public thoroughfare, it cannot escape liability because forsooth its right so to do is an imperfect one, or, for that matter, having no tangible support in point of fact. *Shannon v. Tama City*, 74 Iowa, 23. The record here shows that the way had been used as a county road before the town was incorporated, and that it was thereafter used generally as a street; that for years the town had exercised control over the same, and the sidewalks located thereon. Such being the facts, the trial court committed no error by receiving the evidence offered, and by holding that for the purposes of this action the existence of a public street was sufficiently shown, and might be accepted by the jury as a fact established in the case. The cases cited and relied upon by counsel for appellant, notably the case of *McBurney v. Graves*, 66 Iowa, 314, are not in point. In each of such cases the right of the public to use the way as a street or highway by reason of a legal establishment thereof according to law was directly the subject of the issue.

II. The injury of which plaintiff complains in his petition is that in the fall occasioned by the defective sidewalk his right leg was broken. As a witness plaintiff testified that his previous health had been good; also that as a result of the accident he was confined to the house for a period of eight weeks. Thereupon he was allowed to testify, over the objection of defendant, that his kidneys had become somewhat affected by the inactivity incident to his confinement. This is complained of as error. It is the contention of counsel for appellant that no such injury, or of damage flowing therefrom, is alleged in the petition, and that, therefore, proof of the same was improperly admitted. Pre-

2. PAIN and suffering: pleading: evidence.

vious to the admission of the testimony thus complained of the physician who had attended plaintiff was permitted to testify without objection that a temporary derangement of the kidneys frequently resulted from the confinement due to a broken leg. The testimony of the plaintiff, of which complaint is made, amounted to nothing more nor less than that such temporary derangement had obtained in his case. It may be said, therefore, that it was one of the attending results directly occasioned by the accident, and which simply augmented the inconvenience and suffering plaintiff was called upon to endure. Such being the conditions presented, we think the evidence was properly admitted. The averment of the petition is that by reason of the injury to his leg plaintiff endured great pain and bodily suffering. This is a broad allegation, and we see no reason for confining the proof under it to the pain suffered at the immediate point of the break in the bone of the leg. On the other hand, we think that any bodily disorder giving rise to pain and suffering or physical inconvenience, which can be directly traced to the primary injury as a natural, proximate, and general result thereof, is competent evidence to go to the jury under the issue as here tendered by plaintiff. That pain and suffering constitute an element of compensatory damages has never been doubted, and such need not be specially alleged. *Reddin v. Gates*, 52 Iowa, 210; *Gronan v. Kukukuck*, 59 Iowa, 18. It would be going too far, as we think, and altogether unnecessary, to require plaintiff to allege in detail the name of each organ or part of the body to which the pain and suffering proceeding primarily from the broken leg extended, and, as related to each, the extent of such pain and suffering. It is true, as contended for by appellant, that special damages cannot be recovered unless specially alleged. But it would amount to a perverse use of terms to say that damages can be classed as special which ordinarily, although perhaps not inevitably, follow from a given

cause. Special damages are such as do not ordinarily or generally result from a given cause. They are extraordinary in character in the sense that they follow as the natural result of the intervention of some condition or circumstance out of the ordinary, and therefore not generally to be expected. Where damages so resulting are sought to be recovered, they should be specially pleaded. Such is the holding of the cases cited and relied upon by counsel for appellant.

III. The injury complained of was caused by the slipping or giving way of a loose and broken board in the sidewalk. As a witness upon the stand, plaintiff was allowed to testify, over the objection of defendant, in respect to the condition of the walk for twenty or thirty feet distant on each side of the point where the accident is alleged to have occurred. Such evidence was competent as bearing upon the question of knowledge on the part of defendant of the condition of the walk at the point of the accident. *Armstrong v. Ackley*, 71 Iowa, 76; *McConnell v. Osage*, 80 Iowa, 293; *Smith v. Des Moines*, 84 Iowa, 685. But it was competent for no other purpose. The evidence was admitted generally, and the court did not at the time or thereafter in any way direct the jury respecting the purpose for which the same was admitted, or limit the application thereof to the question to which alone it was relevant. This should have been done had a request been made therefor. But, no such request having been made, and the evidence being competent for one purpose, the appellant is in no position to complain.

IV. It is alleged in the petition that the injuries sustained by plaintiff are permanent in character. During the trial plaintiff offered in evidence the American Life Tables, showing his expectancy of life to be about thirty years. Such offer was objected to by defendant on the ground that there was

3. SPECIAL damages.

4. EVIDENCE: application of: instruction.

5. PERMANENT disability: evidence: instruction.

no proof that the injury complained of was permanent in character. Thereupon counsel for plaintiff stated to the court, in substance, that no claim was made that the proof showed a permanent injury; that the testimony did disclose, however, that the disability of plaintiff would continue for some time yet to come, and that the table was offered for the sole purpose of proving that he would probably live beyond such period of disability. Thereupon the objection was overruled, and the evidence admitted. Of this, considered by itself, we think defendant has no reasonable grounds for complaint. But thereby counsel for defendant was led to believe that no question of permanent disability would be submitted to the jury, and it is fair to presume that in presenting his evidence and argument no attention was paid to the issue of permanent disability as made by the pleadings. It appears, however, that in the statement of the case and in the nineteenth instruction the court directly submitted the question of permanency of the injury to the jury for their consideration and verdict. Such, we assume, was the result of oversight, but that it was prejudicial error is too plain for argument. And it is no answer to say that counsel for defendant should have requested an instruction upon the subject. Under the circumstances he could not well be held to expect that such issue would be submitted to the jury.

V. We think that the requests made for instructions, as far as they correctly state propositions of law applicable to the case, were embodied in the charge of the court. There was no error, therefore, in refusing the same. Other errors assigned need not be noticed, as the questions involved are not likely to again arise upon a retrial of the case.

For the error pointed out in the fourth subdivision of this opinion, the judgment is reversed, and the cause remanded for a new trial.—REVERSED.

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**CREAMERY PACKAGE MANUFACTURING COMPANY, Appellant,
v. BENTON COUNTY CREAMERY COMPANY, CHESTER A.
HODGE AND L. C. EGGLESTON.**

Sales: DELAY IN FURNISHING MACHINERY: SPECULATIVE DAMAGES,

- 1 Mere delay in furnishing machinery which does not interrupt an established business will not sustain an action for damages for loss of patronage.

Breach of Warranty: Excuses For: Evidence. Where one in-

- 2 stalls an ice plant in a creamery building under a contract of warranty, with a knowledge of the size and character of the building, to be accepted by the purchaser upon completion and trial if satisfactory to him, a breach of the warranty is not excused by reason of any claimed defect in the construction of the building.

Failure of Warranty: ACCEPTANCE: EVIDENCE. Evidence in an

- 3 action to recover the price of an ice plant installed in a creamery building under a contract of warranty providing for a trial, and if found to comply with the warranty the purchaser should accept it, is considered and held to show failure of the warranty and that the plant was never accepted.

Construction of the Word "Receipts." In an indorsement on a

- 4 contract for the purchase of machinery it was provided that the purchaser should reserve a certain amount from the "daily receipts" of the business and remit the balance to apply on the purchase price of the machinery. *Held*, that the word "receipts" meant the gross receipts of the business.

Appeal from Benton District Court.—HON. G. W. BURNHAM, Judge.

FRIDAY, MAY 22, 1903.

ACTION for purchase price of machinery contracted for, and the establishment of a mechanic's lien. The answer put in issue the allegations of the petition, and pleaded a counterclaim. A balance of \$610.50 was found due plaintiff, and a decree entered accordingly. Both parties appeal, that of plaintiff being first perfected.—*Modified.*

J. T. Sullivan for appellant.

Gilchrist, Whipple & Brown for appellees.

LADD, J.—Prior to March 4, 1899, the Benton County Creamery Company, a copartnership composed of Chester A. Hodge and L. C. Eggleston, was engaged in establishing a creamery at Vinton. A building for that purpose was nearly completed. A canvass had been made, and oral agreements entered into with farmers, by whom the milk of ten or twelve hundred cows had been pledged on condition that, beginning May 1st, it should be taken at the farms, and, after the separation of the butter fat therefrom, the skim milk returned, and the expenses incident to making the butter, shipping, and marketing it paid. all at a cost to them of four cents per pound, they to receive the balance obtained for the butter. To carry out their part of the arrangement, the defendants had employed a butter maker at \$50 per month, and men with teams to haul the milk on various routes, all to commence work May 1st. Some correspondence had been had with plaintiff, and on March 4, 1899, acting through an agent, Plaintiff, it contracted to furnish defendants an outfit for said creamery for \$1,625, to be shipped "at any time designated by second party after three weeks from date thereof and before sixty days from date thereof." The agent was fully informed of the arrangements detailed, and of the necessity of having the creamery ready for operation by May 1st. On the 14th of April the machinery for an ice plant was bought through the same agent, on the representation that the creamery outfit was ready for shipment, and that the refrigerator machinery, except some coils and tanks, was also ready, and all save these would be placed in a car and forwarded within forty-eight hours. This is denied by the agent, but satisfactorily established by other evidence. Had the shipment been made as proposed, the

defendants might have opened their creamery on the day expected, though the ice plant might not have been entirely completed by that time. Instead of loading all in one car, the articles were separately shipped from the 1st to the 15th of May, and plaintiff's expert did not arrive until May 17th. From ten days to two weeks are ordinarily required to place such machinery, and the ice plant was not in readiness for operation until June 5th. In the meantime many of the promised patrons of the creamery, being relieved from their obligation by failure to open on May 1st or within a reasonable time thereafter, delivered their milk to other parties; and defendant, instead of receiving from ten to twenty thousand pounds of milk per day, as the evidence tended to show they would have done had the creamery been ready May 1st, had in fact taken in but five hundred pounds. To secure the return of part of their customers, even, they were compelled to do the work at a greatly reduced price. The defendants demanded in their counterclaim the payment of damages owing to the breach of the condition of the contract fixing the time of delivery. The objection interposed is that prospective profits of this character are too uncertain, remote, and speculative to furnish a basis of compensation.

Recovery of anticipated profits was generally denied in the earlier decisions. An exception seems to have been first made in the case of torts. *Gibson v. Fischer*, 68

1. DELAY in furnishing machinery; speculative damages.

Iowa, 29. Later such profits were allowed, when the object of the contract, or fairly within the contemplation of the parties, and their loss was the direct consequence of the breach. *Hirschorn v. Bradley*, 117 Iowa, 130; *Rule v. McGregor*, 117 Iowa, 419. In the two cases last cited the agreements had for their design profits to be derived directly therefrom. In others the character of the agreement may be such as to advise the parties of the precise nature of the loss likely to flow directly from a failure to fulfill, as the

interruption of an established business, as was pointed out in the leading case of *Hadley v. Baxendale*, 9 Exch. 841. But in others there may be a loss of prospective profits, which, owing to the impossibility of ascertaining whether resulting directly from the failure to perform, or the relative loss therefrom as compared with other causes, are rejected by the courts as a measure of damages, because of being too uncertain and conjectural for the practical administration of justice. The chief difficulty in distinguishing between the two latter classes is in determining whether the alleged loss of profits resulted directly from the breach of the agreement. If it does, and it was within the contemplation of the parties, the better opinion seems to be that the profits which would in all reasonable probability have been acquired but for such breach should be awarded; otherwise recovery is to be denied unless some other measure of damages, as the reasonable value of the use lost, is available.

Turning now to the case at bar, it is to be observed that neither the making of profits, nor providing the opportunity to do so, formed a part of the contract. No doubt, the ultimate purpose of all business enterprise is the derivation of some advantage through the investment of labor or capital, or both; but, when the manufacturer engages to supply machinery for a plant, it is no part of the contract that a profitable business shall be carried on by the machinery furnished. If there be delay, he may be responsible for the loss of the use, or possibly for interest on the investment, where there is no rental value, but not for loss of profits in the business proposed, which necessarily are contingent upon many circumstances, and which might or might not have been made. *Penneypacker v. Jones*, 106 Pa. 237, 242; *Mining Syndicate v. Fraser*, 130 U. S. 611 (9 Sup. Ct. Rep. 665, 32 L. Ed. 1031); *Howard v. Stillwell*, 139 U. S. 199 (11 Sup. Ct. Rep. 500, 35 L. Ed. 147). Moreover, this enterprise was new, and exper-

ience had furnished no criterion by which to estimate the probable profits. See *Goebel v. Hough*, 26 Minn. 252 (2 N. W. Rep. 847); *Cushing v. Seymour*, 30 Minn. 305 (15 N. W. Rep. 249); *Paola Gas Co. v. Paola Glass Co.*, 56 Kan. 414 (44 Pac. Rep. 621, 54 Am. St. Rep. 598). Those to be derived by defendants from the operation of the creamery depended so largely upon its management, the acquirement and continuance of patronage, the conditions of the butter market, and other considerations, that it would be exceedingly difficult, if not utterly impossible, to ascertain with any degree of accuracy the fruits of the enterprise lost by reason of the delays complained of. Even where the direct object of a contract, it is not easy, as was observed in *Ru'e v. McGregor*, to fix upon a satisfactory estimate. But without further discussion, it is perhaps enough to say that for the mere delay in furnishing machinery which does not interrupt an established business, according to the settled doctrine of this court, prospective profits cannot be allowed by way of damages. *Brownwell v. Chapman*, 84 Iowa, 504; *Novelty Ironworks v. Oatmeal Co.*, 88 Iowa, 524.

II. Under the contract the plaintiff was to erect the ice plant in "first-class order" in the creamery, with coils necessary "for the proper cooling" of four rooms, in each of which a tank was to be placed, "adapted in size and construction to aid in maintaining a uniform degree of refrigeration," and to be well and thoroughly constructed, of suitable material, and "brine-tight." Upon the completion of the ice plant, it was further stipulated that plaintiff was "to operate it six days, and in this time to produce the temperature agreed upon"; that it would "cool the rooms alone to the temperature named in from five to six hours' run, and will cool seven hundred pounds of butter introduced in the cooler, and one thousand five hundred pounds of cream run over the Blair cooler, in one and one-half hours' longer run"; and that "if, upon com-

pletion of the above-mentioned trial, the plant is found to fill in all respects the terms of this proposition, the defendant shall thereupon accept the same."

The evidence conclusively shows that the tanks were not "brine-tight," and that a test such as agreed upon was never made. As constructed, it was incapable of cooling

2. BREACH of
WARRANTY:
excuses for:
evidence.

the rooms within the time specified. There was but two-thirds as much coil, through which the ammonia passed, as was necessary to properly cool the brine in the tanks. The tanks were not heavy enough material, nor sufficiently supported. There were many defective valves, and ammonia constantly leaked from the system. There was constant dripping from the tanks, and the atmosphere in the rooms was loaded with moisture. Plaintiff virtually concedes that the plant did not comply with the contract, and interposes a series of excuses. It is first contended that the building was not properly insulated. The evidence shows the contrary. Next it is said that a sufficient foundation for the compressor was not provided, but plaintiff failed to furnish specifications therefor as agreed, and its agent approved that provided. Thirdly it insisted that defendant prevented the construction of a false ceiling in the churn and cream rooms. This may be conceded. Such ceiling was not mentioned in the plans. The height of the rooms was stated in the contract, and the coils through which the ammonia passed as it expanded were to be sufficient to maintain the temperature at fifty-five degrees Fahrenheit at the ceiling of the cream and churn rooms, and thirty-five degrees in the storage rooms; thus negating all notion of additional ceilings. The false ceiling would inclose the brine tank, and exclude it from the air below, but manifestly would not produce cold. That is done by the coils through which ammonia circulates, and the brine tanks store it. The erection of these ceilings would merely reduce the air space of the room,

and help to better confine and control the cold air. But the rooms as they existed were to be cooled, and ceilings such as were proposed were not contemplated in making the contract. The suggestion of them was an afterthought—a makeshift conceived to counteract the results of a defective plant.

But it is argued that, notwithstanding all this, the ice plant was accepted. It is said that defendants prevented the completion of the plant. The evidence fails to estab-

lish this. Hodge wrote plaintiff May 15th, reviewing its shortcomings, and indicating the necessity of an adjustment. In response,

McNish, acting for plaintiff, visited defendants, and was plainly told that the machinery would not be accepted. To induce defendants to remove a part of it from the railroad depot, and allow plaintiff to erect the ice plant as proposed, a change in the method of payment was agreed upon; and McNish undertook to send Pattiani, the salesman, to aid in inducing the return of the patrons, and to adjust the damages defendants had suffered by reason of plaintiff's delay in shipping the property. True, McNish, while admitting that he recognized that defendants had suffered damages because of the delay, and that he discussed the amount which ought to be allowed, denies that he agreed that Pattiani should make settlement. The clear weight of the evidence, however, is to the contrary, and, further, that Pattiani actually saw the farmers as proposed, and negotiated with defendants for the settlement of their damages. With this understanding, the creamery began operation June 5th. It was several days thereafter that plaintiff's expert first suggested the false ceiling. As previously indicated, the defendants were under no obligation to permit its construction. The evidence leaves no doubt but that this was the only obstacle interposed to the completion of the plant, though some of plaintiff's witnesses evidently construe refusal to allow its

3. FAILURE of
warranty;
acceptance;
evidence.

construction as preventing the plant from being put in proper condition. This ceiling was the subject under discussion, and what Hodge said must be construed with reference thereto. When Pattiani came, on July 22, Hodge advised him "to go ahead and do whatever was necessary to make the plant right." This was at first admitted by Pattiani, but afterwards he was unable to recollect it. Woodring was not allowed to meddle with the plant in October, for the reason that plaintiff's attorney had directed defendants to recognize no one without credentials as representing plaintiff.

It is urged, however, that defendants have made use of the plant as their own. It was in pursuance of the understanding had with McNish that the machinery was taken from the depot, and plaintiff's expert permitted to place it. There is no question but that he left it without making the test stipulated, and we think that defendants undertook to operate it, at the express invitation of Pattiani, until he could send a man to complete it. While the latter denied this, the testimony of Hodge to that effect is confirmed by Eggleston and all the circumstances of the case. The plant was merely left in defendants' care, and was so continued by plaintiff's attorney. The purpose in employing the expert, Affleck, was to ascertain its condition, and not to mend it for use.

Appellant also claims that lien on the property for damage was asserted by coupling the demand that the machinery be removed with a request that the damages for delay be settled. Evidently counsel overlooks the fact that the contract is in the nature of a proposal, the consummation being dependent on the defendants' acceptance. Nothing is shown to have been written or said which can be fairly construed as a demand for the payment of damages, as a condition precedent to such removal. We conclude that, as it did not comply with the conditions

of the contract, was never tested as agreed, and has not been accepted, the defendants are not liable for the price.

III. By the terms of the contract entered into March 4, 1899, the plaintiff guaranteed all the articles constituting the creamery outfit "to be of first quality in every respect." The evidence conclusively showed that the "ideal automatic skim-milk weigher," priced at \$100, was worthless. It is conceded that the sum of \$144 advanced for freight on the refrigerator machinery should be allowed defendants as an offset. The weight of the evidence is to the effect that all the machinery was to be put in one car, rather than transported as separate articles, as was done; and the difference in the expense, amounting to \$62.50, was rightly allowed. Three of the vats were defective, and we are not inclined to reduce the damages (\$205) awarded by reason thereof. Such articles, when not constructed as required, are ordinarily of little value. As Hodge had investigated the prices of articles essential in making up a creamery outfit, he was, in a measure, qualified to testify. These articles were not received with full knowledge of their condition, and hence the authorities relied on by appellant are not in point. See *Berthold v. Seevers Mfg. Co.*, 89 Iowa, 506.

IV. The defendants paid \$500 on the contract, and should be allowed as damages \$514.50. This leaves a balance owing of \$610.50. The indorsement on the contract made by McNish, May 18, 1899, provided that "the Benton County Creamery Co. shall reserve seven dollars each day from their daily receipts and remit all receipts above this amount to the Creamery Package Mfg. Co., on the first of each month. This clause covers receipts from both mill and creamery. This agreement shall remain in force until the indebtedness shall be paid, or until another arrangement for payment may be made." The receipts here contemplated are the gross receipts of defendants, the \$7 evidently being allowed for

4. CONSTRUCTION of word "receipts."

expenses incident to the operation of the establishment. Were there any doubt about this, it is set at rest by the conversations had between the parties at the time. The evidence shows that not exceeding \$7 per day was received by defendants until June, 1900. During that and the two months following, the receipts were \$738.87. It is to be assumed that operation on Sunday was not contemplated, and hence \$182 should be deducted from each month, or \$546 for the three; and, under this stipulation, but the difference, of \$187.87, was due the plaintiff. The petition asked for an accounting under this stipulation, and under it plaintiff should have been granted no more than above stated. The decree will be modified to this extent, and the cause remanded for further accounting in conformity with the stipulation with respect to payment.

Decree MODIFIED and cause REMANDED.

MARY McCORMICK, Appellant, v. McCORMICK HARVESTING MACHINE COMPANY AND H. A. BEATIE, Sheriff, Appellees.

120 593
128 157

Execution Sale: PRIOR CONVEYANCE: NOTICE. Where a tenant

1 is in possession of real property under a lease from an administrator, the mere statement to the tenant by the husband of the grantee of one of the heirs that such grantee has purchased the interest of such heir is insufficient to constitute notice of the grantee's rights in the property to one who purchases the interest of the heir at a judicial sale

Sufficiency of Description: ESTOPPEL. A description of real prop-

2 erty that will pass title by a deed is sufficient in a judicial sale, and where one seeking to enjoin an execution sale alleges ownership of the property described in the execution he is estopped to deny the sufficiency of description.

Appeal from Sac District Court.—HON. S. M. ELWOOD,
Judge.

FRIDAY, MAY 22, 1908.

VOL. 120 IOWA.—38.

SURT in equity to enjoin the execution of a sheriff's deed on certain real estate alleged to belong to plaintiff. The trial court dismissed the petition, and plaintiff appeals.—*Affirmed.*

Gg W. Bowen and C. W. Goldsmith for appellant.

Lee & Robb and W. I. Selby for appellees.

DEEMER, J.—On November 9, 1889, the defendant McCormick Harvesting Machine Company obtained judgment against Peter McCormick. Catherine McCormick, mother of Peter and of four other children, who were her sole and only heirs, died intestate in January of the year 1900 seised of two hundred and fifty acres of land in Sac county, Iowa. One Anton Benzkofer rented the said land for the year 1900 from the administrator of Catherine McCormick's estate. On August 16, 1900, the McCormick Harvesting Machine Company sued out an execution on its judgment, which was levied on the interest of Peter McCormick, heir at law of Catherine McCormick, deceased, in and to the S. W. $\frac{1}{4}$ of section 24 and the E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 28 in township 86, range 86, Sac county, Iowa. This interest was sold at sheriff's sale October 28, 1900; the plaintiff in execution, who is one of the defendants herein, being the purchaser. Under date of March 28, 1900, Peter McCormick (his wife joining therein) executed a warranty deed for his one-fifth interest in said lands to the plaintiff herein; but this deed was not filed for record until February 21, 1901. The McCormick Harvesting Machine Company had neither actual nor constructive notice of this deed at the time it purchased the land at sheriff's sale, unless it be found to have obtained it by and through the possession of Benzkofer. Appellees contend that this deed was without consideration, fraudulent, and void, in that it was made with intent to hinder, delay, and defraud Peter McCormick's creditors. They also say that they

had no notice thereof at the time of the sheriff's sale, and that the decree dismissing plaintiff's petition was therefore correct. On the other side, it is contended that defendants had notice of the deed through the possession of Benzkofer, and that, in any event, the description of the property levied upon and sold by the sheriff was insufficient to carry the title to the one-fifth interest at one time owned by Peter McCormick. It will be observed that plaintiff concedes notice to defendants of the conveyance was necessary at or before the time of the sheriff's sale, in order that she may obtain the relief she seeks. This notice is claimed to have been given through the possession of Benzkofer, the tenant in possession. Benzkofer did not secure his possession from plaintiff, but from the administrator of Catherine McCormick, deceased.

Plaintiff contends, however, that her husband gave notice to Benzkofer that she (plaintiff) had purchased Peter McCormick's interest in the land, long before the
 1. EXECUTION
 purchaser:
 prior con-
 veyance:
 notice.
 levy and sale, and notified the tenant that he should account to her (plaintiff) for her share of the rents under her purchase. If such notice was given, no attention was paid to it, for the tenant paid the rents to the administrator, and the sums so paid were used in paying debts and the costs of administering the estate of Catherine McCormick, deceased. After going over the evidence as presented by the record, we think plaintiff has failed to show that she gave the tenant such notice of her purchase that persons thereafter dealing with the land would be bound to take notice of her rights through Benzkofer's possession. The tenant denies having received any notice, and there are many things in the record which tend to corroborate his testimony. The testimony on the part of plaintiff, at most, shows a random statement made by plaintiff's husband to the tenant then in possession to the effect that his wife had purchased Peter McCormick's interest in the land.

Nothing was said about his paying rent to the plaintiff, nothing about the administrator's lease or plaintiff's interest therein, and nothing about any attornment to the plaintiff. Surely this was not enough, in the absence of any contradiction, to create such a change in the possession as to give parties dealing with the land in the future notice of plaintiff's rights under her deed. But the matter of notice is denied by the tenant, and, as plaintiff has the burden, she must fail on this issue. Moreover, as Benzkofer did not recognize plaintiff's title, did not attorn to her, nor pay her any rent, he was at no time in a position where he could not have denied plaintiff's title. Nothing was done which made plaintiff his landlord; hence his possession was referable to his lease from the administrator, and did not give subsequent purchasers notice of plaintiff's rights under the deed. *Wilkins v. Bevier*, 43 Minn. 213 (45 N. W. Rep. 157, 19 Am. St. Rep. 241).

II. Referring now to the sufficiency of the description under which the land was levied upon and sold: In such cases the description need not be as accurate as where

2. SUFFICIENCY of description: estoppel lands are sold for taxes. Every reasonable intendment is made in favor of judicial sales, in order to secure the objects which they are intended to accomplish. In this respect they differ from tax sales; hence authorities regarding the sufficiency of description in such cases are not in point. Had Peter McCormick made a deed of his interest in the land to another under substantially the same description as that contained in the levy and certificate of purchase, no one would contend, we think, that it did not pass his interest. This being true, we are at loss to understand why a levy and sale on execution by the same description does not pass title. The authorities almost universally hold such a description good. *Brown v. Smith*, 7 B. Mon. 362; *Humphrey's Ex'r v. Wade*, 84 Ky. 400 (1 S. W. Rep. 648); *Woodward v. Startwell*, 129 Mass. 214; *Smith v. Crosby*, 86 Tex. 15 (28 S. W. Rep. 10,

40 Am. St. Rep. 819). That such a conveyance by deed would be good, see *Stewart v. Cage*, 59 Miss. 558; *Barton's Lessee v. Morris' Heirs*, 15 Ohio, 408; *Stambaugh v. Smith*, 28 Ohio St. 584; *Thornton v. Mulquinne*, 12 Iowa, 549. Moreover, plaintiff alleged that she was the owner of an undivided one-fifth interest in and to the real estate described, derived by deed from Peter McCormick; that defendant had levied upon said land as the property of Peter McCormick, and had advertised and sold the same. Under such circumstances, a court of equity will not permit her to take advantage of the alleged insufficiency of description. *Hackworth v. Zollars*, 30 Iowa, 438.

We have no occasion to consider the *bona fides* of the conveyance from Peter McCormick to the plaintiff, as, for reasons already stated, she is not entitled to recover, even if we conceded that the conveyance was a valid one.

The decree is correct, and it is **AFFIRMED**.

E. MEYER, Appellee, v. **H. A. BAIRD AND JOHN G. WOODARD & COMPANY**, Appellants.

120	597
143	676

Fraudulent Sale of Goods: ADMISSIBILITY OF EVIDENCE. Error in

- 1 the exclusion of evidence is cured by the subsequent admission of testimony covering the same point.

Instructions: USE OF CONJUNCTIVE "AND" FOR DISJUNCTIVE "OR."

- 2 In a suit by a vendee against an attaching creditor of the vendor, the error in an instruction that if the parties to the sale intended thereby to hinder, delay "and" defraud creditors, is harmless, where the same instruction in other paragraphs contains the disjunctive "or".

Exemplary Damages: INSTRUCTION. Where the verdict is against

- 3 a claim for exemplary damages, error in instructing on the claim is harmless.

Appeal from Pottawattamie District Court.—**HON. O. D. WHEELER**, Judge.

FRIDAY, MAY 22, 1908.

ACTION at law to recover damages for the levy of an attachment upon goods. Judgment for plaintiff, and defendants appeal.—*Affirmed.*

Flickinger Bros. for appellants.

F. W. Miller and Saunders & Stuart for appellee.

WEAVER, J.—A firm, styled "Crawford & Young," owned a small stock of goods in Council Bluffs, and were indebted in the sum of about \$40 to the defendants John G. Woodard & Co. On August 1, 1900, plaintiff claims to have purchased the entire stock of goods from Crawford & Young, taking from them a bill of sale thereof, and to have gone into possession about three o'clock in the afternoon of that day. Later in the day Woodard & Co. sued out a writ of attachment, under which Baird, as constable, seized a part of the goods. Plaintiff thereupon brought this action to recover the value of the property taken and for exemplary damages. Defendants deny the purchase by plaintiff, and allege that the pretended sale to him was made in fraud of the creditors of Crawford & Young. Plaintiff recovered judgment for the value of the goods, \$84.20, without other damages, and defendants appeal. The errors alleged relate wholly to rulings by the trial court upon the admission of testimony and to instructions given and refused.

Defendants' collector, as a witness in their behalf, testified to presenting the claim to Crawford & Young for payment about nine o'clock a. m. of the day of the attachment, and was asked by counsel whether payment was refused. Answer to this question was ruled out on plaintiff's objection. We think it should have been admitted as having some bearing upon the alleged fraud of Crawford & Young in making the sale. The error in its exclusion was sufficiently cured, however, by allowing the same witness thereafter to describe no

1. A. MIS-
SIBILITY
BILITY of
evidence.

less than five or six subsequent visits and unavailing demands of payment made by him at frequent intervals during the day. This testimony makes plain all that the excluded answer could possibly have revealed.

Other objections made to the court's rulings are of a trivial character, and involve no prejudicial error.

As to the instructions requested by the appellants, it is sufficient to say that, so far as they involve correct principles, they are embodied substantially in the charge of the court. In paragraphs five and six of the charge the court, in attempting to state the familiar rule as to sales and conveyances made in fraud of creditors, said to the jury that if the parties, in making such purchase and sale, intended thereby "to hinder, delay, and defraud the creditors of Crawford & Young," the transaction was void as against the writ of attachment. This expression is criticised because of the use of the word "and" instead of "or" in the quoted sentence. It will be conceded that to establish fraud, as that word is here used, the law required the creditor to do no more than prove the intent of the parties to hinder or to delay or to defraud, and that, if either of these conditions be established by the evidence, the attachment must be sustained. It follows that, if we look alone to this particular clause of the charge, it must be held erroneous. We think, however, when the entire charge is read, it is quite clear that "and," as here employed, has the force and effect of "or," and that the jury could not have been misled by it. The jury were elsewhere clearly told that, if they found from the evidence "that Crawford and Young did make the transfer to plaintiff for the purpose of hindering, delaying, or defrauding their creditor," and that plaintiff participated in such wrongful design, or had knowledge of it, or knew facts and circumstances from which, as a reasonable man, he ought to have inferred the same, then he was not en-

2. INSTRUCTIONS: use of
"and" for
"or."

titled to recover. This thought is repeated more than once in the course of the instructions, and it is beyond comprehension that the jury should have given the court's language the interpretation placed upon it by the appellant. The several paragraphs are not contradictory, but are rather mutually explanatory. They are, in effect, as if the court had said to the jury: "The causes which will render a sale void are, first, intent to hinder; second, intent to delay; and, third, intent to defraud the creditors of the seller. If, then, you find that either of these essential facts has been established by the evidence, and plaintiff knew, or ought to have known, of such wrongful intent, the sale to him must be treated as void, and he cannot recover;" and this, we think, is the law as applicable to the issues in this case.

The instructions as to the manner and sufficiency of a levy of an attachment are not objectionable. Appellant, in discussing this question, assumes as undisputed that a levy was in fact made before any change occurred in the possession of the goods, and without any notice of the plaintiff's purchase. The record does not bear out this assumption. Both propositions are the subject of dispute in the testimony, and were properly submitted to the jury.

It is further said the court erred in instructing the jury upon the plaintiff's claim for exemplary damages.

3. **EXEMPLARY damages: instruction.** The jury having found in appellant's favor upon the claim for such damages error, if any, in the submission of that issue, was without prejudice.

The judgment of the district court is **AFFIRMED**.

CEDAR RAPIDS & MARION CITY RAILWAY COMPANY, Appellant,
v. JOHN M. REDMOND, Mayor of the City of Cedar
Rapids, Iowa, *et al.*

Taxation: INCREASE OF ASSESSMENTS: NOTICE: WAIVER. The provision of an ordinance of a special charter city that before the board of equalization can increase an assessment a notice containing an alphabetical list of the owners of the property and its assessed valuation shall be posted at the door of the collector's office, must be strictly complied with before an assessment can be legally increased; and the fact that a taxpayer may know of the proposed increase and appears before the board of equalization for the purpose of explaining his assessment, and to protest against the action of a committee recommending an increase, will not constitute a waiver of the posted notice required by the ordinance.

Appeal from Linn District Court.—HON. W. N. TREICHLER,
Judge.

SATURDAY, MAY 23, 1908.

IN the lower court plaintiff asked a writ of *certiorari* to inquire into the legality of the action of the mayor and city council of the city of Cedar Rapids, acting as a board of review for the equalization of assessments for taxation in said city, in raising plaintiff's assessment, without proper notice thereof. After a hearing on the merits, the lower court held the action of defendants to be valid, and dismissed plaintiff's petition. Plaintiff appeals.—*Reversed.*

Chas. A. Clark & Son and *William G. Clark* for appellant.

John N. Hughes for appellees.

MCCLAINE, J.—In the year 1900 the assessor of the city of Cedar Rapids, which is a city under special charter,

returned an assessment of plaintiff's realty at \$48,000 and personalty at \$24,740. In Code, section 1010, cities under special charter are given power to provide by ordinance for the equalization of assessments, and under this power the city of Cedar Rapids had provided by ordinance that after the return of the assessment and the making of the levy based thereon the collector of taxes shall publish a notice of assessment and levy in general terms, and shall give notice that the city council will hear any complaints in regard to the assessment at any meeting within thirty days from the date of the first publication; and, further, "the city council, sitting as a board of equalization, shall at each meeting within the thirty days therein provided make such further changes and corrections in the assessments as are necessary to make them just and equitable; provided, that before the assessed valuation of any property is increased, an alphabetical list of the names of the owners (when known) of property, the assessed valuation of which it is the purpose to increase, shall be posted at the door of the collector's office, and said notice shall give the date of a regular or special meeting of the council for the final action thereon, which meeting shall be held not less than seven days from the date of posting notice of such meeting. At the first regular or special meeting of the city council after the expiration of thirty days from the date of the first publication of notice by the collector of the assessment and levy, the city council shall approve the assessment as changed and the levy as theretofore made."

It is evident that by these provisions of the ordinance a procedure similar to that provided for by statute in the case of cities not acting under special charter is contemplated. See Code, sections 1870-1872. The general notice of the assessment and levy is sufficient to give property owners an opportunity to appear before the board of equalization and make complaint as to the correctness of the returns made by the assessor. But, if the board of

equalization proposes to raise the assessment returned by the assessor, then the property owners must have special notice of such purpose which is given to him by posting at the door of the collector's office of an alphabetical list of the names of the owners of property, the assessed valuation of which the board proposes to increase. The record in this case shows that the general notice by the collector was given, but that no alphabetical list containing the name of plaintiff, or advising it of any purpose to increase the assessed valuation of its property, was posted. Notwithstanding such failure to post notice, the board of equalization, on the 13th day of November, proceeded by resolution to raise the valuation of plaintiff's real estate, including its street car line, track, and overhead line, to \$65,000, and the valuation of its personal property to \$30,000, and this increased valuation was made the basis not only for city taxation, but for taxation by the county and state. One of the contentions for appellant is that this increase of assessed valuation, being made without the notice required by the ordinance, is void, and the conclusion which we reach on this question will dispose of the case.

Counsel for appellant contend that plaintiff had actual notice of the purpose to increase the assessed valuation of its property such as to render the posting of notice unnecessary, and in support of this contention they rely upon certain proceedings before a so-called "advisory committee" provided for by the ordinances of the city, which is to be appointed during the month of April of each year by the council, and to consist of three persons, not members of such council. This committee is required to meet after the publication of notice of assessment and "examine the assessment of all real and personal property, and report to the council such changes, additions, and corrections as will, in their judgment, make the assessment fair, just and equitable to all property owners, and such report shall be merely advisory to the city coun :

cil." It is further provided that "any person shall have the right to be heard before the committee at any time during its session, and any property owner aggrieved by any recommendation of the committee or by the assessment of any property as made by the assessor, shall have the right to make complaint to the city council in writing, and such right shall not be affected by the failure to appear before the advisory committee." It appears that this advisory committee in July adopted a report in which it is recommended that the total assessment of plaintiff's property be increased from \$72,740, as reported by the assessor, to \$150,000, and by way of explanation of this increase the following statement is made in the report: "We find the assessment of the street railway as given above, and there is a note in lead pencil on the assessor's book 'less railway,' which we take to mean he has not assessed track, tools, or wires in the city, under an apprehension that the same is assessed by the executive board of the state, which we are informed is wrong, and which leaves the assessment evidently so unfair that we recommend the above assessment."

On September 14, 1900; the plaintiff, by its president, presented a communication to the city council, sitting as a board of equalization, in which it is set forth that the assessment entered against plaintiff on the assessment roll on "lots four (4) and five (5) in fractional block one (1), and lots three (3), four (4), and five (5) in block nineteen (19) (less railway)," at the actual value of forty-eight thousand dollars (\$48,000), is erroneous, and does not correspond with the assessment as actually made by the assessor, which specifically includes as a part of the real estate "nine and thirty-one hundredths miles street car line track and overhead line, less railway," and that the words "less railway," inserted by the assessor in pencil, did not indicate an exception from the assessment of the street car line, track, and overhead line, but an exception

of the value of the right of way of the Chicago & Northwestern Railway Company where it crosses the street car line. The statements as made in this communication are supported by a communication from the assessor to the city council containing the same explanation.

On this showing the plaintiff asked in this application that its assessment be corrected on the assessment roll so as to show that the assessment of real property, as returned by the assessor, included plaintiff's street car line, track, and overhead line, and excluded the Chicago & Northwestern Railway Company's right of way. The city council changed the assessment roll so as to show the inclusion of the street car line, track, and overhead line, but raised the assessment of plaintiff's property, as already stated. The claim of counsel that this action of plaintiff obviated the necessity for posting of notice of a purpose to increase its assessment is not well founded. The action of the committee was advisory only, and the council could determine as it saw fit whether to act thereon or not. Plaintiff's communication indicated reasons to the council why the recommendation was erroneous, and the result of a misunderstanding of the assessment, and the plaintiff had a right to assume that if the council, in view of the recommendation of the committee and the explanatory communications of its president and the city assessor, proposed to raise the plaintiff's assessment, the posted notice of such purpose would be given, as required by the ordinance. The action of the advisory committee in recommending the raising of the assessment was not equivalent to nor a substitute for a determination by the city council to increase such assessment, of which determination the plaintiff had a right to have notice. The council acted without authority in increasing the assessment without such notice, and the trial court should have held the increased assessment to be valid.—REVERSED.

M. H. KING, Appellant, v. G. A. NELSON, *et al.*

Chattel Mortgages: DECREE OF FORECLOSURE: COLLATERAL ATTACK.

- 1 A decree directing sale under special execution of property covered by a chattel mortgage in another county cannot be collaterally attacked, even though the mortgage provides for a sale in the home county.

Special Execution: ISSUANCE OF. On the foreclosure of a chattel

- 2 mortgage, where the petition states the requisite facts, the decree may direct the issuance of a special execution for any part of the property wherever located in the state.

Pleadings: ALLEGATIONS OF FRAUD. In an action to recover for

- 3 property sold on execution as claimed in the wrong county, allegations of fraud in procuring the judgment should, on motion, be stricken out.

Appeal from Polk District Court.—HON. W. F. CONRAD,
Judge.

SATURDAY, MAY 23, 1903.

THE plaintiff gave a chattel mortgage to the German Savings Bank of Des Moines upon property partly in Des Moines and partly in Louisa county. The mortgage stipulated for the usual foreclosure and sale by the mortgagor upon notice, and also for any other lawful method of foreclosure. The mortgage contained the following: "It is further agreed that the sale above provided for shall take place in any place within the city of Des Moines, or county of Polk, that may be determined upon by the German Savings Bank, by giving at least ten days' notice thereof, by posting up written notices in three public places in said county; and the said M. H. King further authorizes the persons conducting said sale to adjourn the same if being in his opinion necessary from time to time until such property be sold." King was a resident of Des Moines,

and the mortgage was foreclosed in the district court of Polk county upon proper notice and default; the decree providing that a special execution issue to Louisa county for the sale of the property located there, and that a special execution issue for the sale of the property located in Polk county. The Louisa county property was sold there under the special execution issued for that purpose, and this action was brought to recover its value because of its sale there instead of in Polk county. A demurrer to the first count of the petition was sustained. The plaintiff elected to stand upon his pleading, and judgment was rendered against him. There were also rulings on a motion to strike and on a motion to make specific, adverse to the plaintiff, from all of which he appeals.—*Affirmed.*

O. C. Cole for appellant.

Dowell & Parrish for appellees.

SHERWIN, J.—It is contended that the bank or its assignee had no right, under the mortgage or under the decree in the foreclosure case, to sell any part of the property in Louisa county. The mortgage may fairly and naturally be construed to provide for the sale of the property in Polk county only in the event of its foreclosure by the mortgagee by notice and sale, without the intervention of the courts. But, however this may be, the jurisdiction of the district court in the foreclosure proceedings is unquestioned, and its decree therein, though unauthorized by the terms of the contract between the parties, must stand as an adjudication binding upon all parties until set aside or modified by direct proceedings. It cannot be collaterally assailed. *Finch v. Hollinger*, 47 Iowa, 173; *Moore v. Jeffers*, 58 Iowa, 202.

The argument that the decree authorizing an execution to issue to Louisa county was of no force, because of sec-

1. FORECLOSURE
decree: col-
lateral at-
tack.

tion 8955 of the Code, is not sound. That section relates only to general executions. In the foreclosure case against the plaintiff, it was decreed that the mortgaged property be first exhausted for the satisfaction of his debt; and this was in strict accord with the terms of section 8772 of the Code, which provides that, "where any other than a general execution of the common form is required, the party must state in his pleading the facts entitling him thereto, and the judgment may be entered in accordance with the finding of the court or jury thereon." Surely the pleading in the foreclosure of a mortgage covering specific personal property would state the facts entitling the plaintiff to a special execution under this statute, and, if it did, the plaintiff therein had the right to ask, and it was the duty of the court to decree, that a special execution issue for any part of the property, no matter where it was located within the state. This is clearly not a case founded upon a malicious prosecution, and the authorities cited by the appellant dealing with such cases are not in point.

The averments of the petition relative to the statements of counsel in the foreclosure case, by which the plaintiff herein claims to have been misled, were properly stricken. They could have no bearing upon the case, except to show fraud in procuring that judgment, and that question could not be investigated in this case. The motion for a more specific statement was, in our judgment, sufficiently specific. It seems to meet the exact requirements of the statute.

The demurrer and the motions were rightly sustained, and the judgment is **AFFIRMED**.

BISHOP, C. J., taking no part.

WILLIAM MONTGOMERY V. E. J. MANN, Appellant.

Reformation of Deed: MUTUAL MISTAKE. To reform a deed on the
1 ground of mistake, the mistake must be mutual.

Evidence: STATEMENT OF HUSBAND. In a suit by the grantor to
2 reform a deed, statements of the grantee's husband, made after
the transaction, are inadmissible, where there is no showing
of authority to speak for grantee.

Evidence: MUTUAL MISTAKE. Evidence in a suit to reform a deed
3 so that coal in the land shall be reserved to the grantor con-
sidered and held insufficient to show mutual mistake.

Appeal from Polk District Court.—HON. C. P. HOLMES,
Judge.

SATURDAY, MAY 23, 1908.

SUIT for reformation of deed. Decree as prayed, and
defendant appeals.—*Reversed.*

Thomas F. Stevenson for appellant.

James Nugent for appellee.

LADD, J.—On the 23d day of September, 1896, the plaintiff exchanged three and one-fourth acres of land to the defendant for certain city lots, each property being improved, and subject to incumbrances of about equal amount. The land is underlaid with a vein or stratum of coal, and in this suit, begun March 1, 1901, the plaintiff asks the deed of conveyance to defendant be so corrected that said coal shall be excepted therefrom and retained by plaintiff. Previous to the negotiations which resulted in an exchange, the plaintiff and defendant's husband had entered into an agreement under which defendant was to

VOL. 120 IOWA.—39.

receive three acres of land without the coal. One Mount prepared a written memorandum thereof, which was signed by plaintiff and the husband, and also a deed and mortgage, which were necessary to carry it into effect. Undoubtedly, a mistake was made by him in omitting the exception from this deed, as he testified; but he knew nothing of the terms of the agreement as finally consummated. As plaintiff testified, the husband backed out. According to the latter and defendant, the agreement was made subject to her approval, which was withheld because of the retention of the coal. Though plaintiff denies it, and also any personal acquaintance with defendant, the evidence satisfactorily shows that he subsequently took the defendant and her husband out to see the land. Both so testify, and they are confirmed by their daughter and two disinterested witnesses. Defendant testified that she then advised plaintiff that she would not trade for the land without the coal, and in this she is corroborated by her husband. No agreement was reached at that time, but a few days later she sent word by her husband that she would trade for three and one-fourth instead of three acres of land, subject to an incumbrance of a \$1,000 instead of \$700. No mention was made of the coal, and Mount merely changed the description in the deed and the amount of the mortgage previously prepared, and these were executed.

Possibly plaintiff supposed the coal was to be excepted in the deed, for he had previously arranged to lease it to the Keystone Coal Company. But, to justify the reformation of the deed, the mistake must have been mutual. The defendant testified that she did not understand the coal was to be excepted, and would not have exchanged had such exception appeared in the deed.

Evidence of the husband's admissions, alleged to have been made long subsequent to the transaction, was not

1. REFORMATION of deed: mutual mistake.

offered for the purpose of impeachment. It was admissible for no other purpose, for the reason that he was not shown to have been authorized in any way to speak for her.

It seems to be thought that, as the coal was to be excepted under the memorandum signed by her husband, which she repudiated, and nothing was said of the coal in the oral agreement consummated, she ought to be bound by an inference that the terms were to be the same as before, save as modified. But, as we think, she had refused to take the land under the first arrangement because of the exception to be included in the deed, and had informed Montgomery, when returning from the land, that she would not take it without the coal. If so, the inference is quite as, if not more reasonable, that her offer was made on this basis. Her claim is somewhat confirmed by proof that, even with the coal included, she was giving more for the land than its fair value. Though coal was being taken from beneath the surface through a shaft near by, this was so close to the line that she may well have thought it from adjoining land. Her testimony is uncontradicted, save by a witness who says that when at her home he heard her caution her husband not to allow the agent to bind them for the delivery of the coal, as it did not belong to them. This was more than four years after the trade, and is denied by defendant. The evidence of mistake on her part falls far short of being of that clear and satisfactory character exacted in order to justify reformation. See *Hunt v. Gray*, 76 Iowa, 268; *Murphy v. First National Bank*, 95 Iowa, 325; *Hoyer v. King*, 101 Iowa, 363. No persuasive equitable considerations are manifest in this record, and we reach the satisfactory conclusion that the plaintiff has failed to establish a mutual mistake by the quantum of proof essential in such cases.—REVERSED.

O. B. HAWORTH, Appellee, v. W. B. CROSBY AND J. B. HENSHAW, Appellants.

Principal and Surety: FRAUD IN SECURING SIGNATURE OF SURETY: DEFENSE. Where a surety signs the note of the principal on the representation that its proceeds are to be applied to the purchase of specific property, when he intends and in fact uses the same in payment of an antecedent debt, the surety may defend a suit on the note on the ground of fraud, and it is error to strike from the answer allegations of fraud.

Appeal from Polk District Court.—HON. W. F. CONRAD, Judge.

SATURDAY, MAY 23, 1903.

ACTION upon a promissory note. Judgment for the plaintiff, and the defendant J. B. Henshaw appeals.—*Reversed.*

Myerly & Myerly for appellant.

Howe & Miller for appellee.

WEAVER, J.—The defendant Henshaw signed the note in suit as surety. His answer alleged that his signature to such instrument was procured by fraud, in which the principal debtor and plaintiff participated; that by means of such fraud he was induced to believe, and did believe, that plaintiff was lending money to Crosby, who was to use the same in the purchase of certain shares of stock in a corporation in which appellant or appellant's wife was interested; that in truth Crosby did not intend to purchase said stock with the money so procured, but was already the owner thereof, and that said note, or the proceeds thereof, were intended to be, and were in fact, used in

part in paying a debt already due and owing from Crosby to the plaintiff. Plaintiff assailed this answer by motion to strike therefrom all the allegations therein contained except the averment that appellant executed the note as surety, and the demand that the collateral security and the property of the principal defendant be first exhausted before resorting to appellant's property for the payment of the debt. The motion was sustained, and the correctness of this ruling is the only question for our consideration.

I. The one ground of the motion to strike is that the matter pleaded is irrelevant and redundant, in that it fails to aver or show that the surety has suffered, or will suffer, any prejudice or damage as the result of the alleged fraud practiced upon him. The motion should not have been sustained. If any allegation of prejudice is needed, we think the matter stricken from the answer is broad enough to meet that requirement. It alleges that, in order to obtain his signature to the note, he was led to believe that the money so procured by Crosby was to be invested in the purchase of certain property of an apparent value in excess of the debt represented by the note, but that in truth such money or a substantial part of it was intended to be used and was used to pay an old debt from Crosby to the plaintiff. A person may be willing to become surety for another in the purchase of property representing value equal to or exceeding the obligation thus assumed, and yet very reasonably refuse to become the same man's surety for money with which to pay an antecedent debt. In the one case the surety is to some extent protected from ultimate loss by the fact that his principal becomes the owner of additional property which may be applied to the payment of the obligation, while in the other no such benefit or advantage results, and the surety is to that extent prejudiced.

But assuming that no prejudice is alleged, appellant still had the right to attach such conditions as he saw fit

to his consent to become Crosby's surety, and to insist upon knowing to what use the money obtained was to be applied; and if, by collusion between Crosby and plaintiff, he was induced to believe it was to be invested in a certain item of property, when such was not the true intent, and the money was not in fact so applied, it is a fraud upon him, and he may plead it in defense to an action upon the note. *Crossley v. Stanley*, 112 Iowa, 24. The case of *Ham v. Greve*, 34 Ind. 18, is also directly in point. There the surety was induced to sign a note by the representation of the payee that it was to be used in payment for goods, when in fact it was really used to pay a pre-existing debt, and the court held the surety was not bound. A similar holding may be found in *Trammell v. Swan*, 25 Tex. 473. Under the doctrine of the authorities cited, which seems to be entirely just, it was error to strike the allegations of fraud from the answer. This conclusion renders it unnecessary for us to pass upon the other question of pleading and practice argued by counsel.

The judgment of the district court is reversed, and cause remanded for further proceedings in harmony with this opinion.—REVERSED.

WILLIAM GERMINDER, Appellee, v. THE MACHINERY MUTUAL INSURANCE ASSOCIATION OF WATERLOO, Iowa, Appellant.

Insurance: EVIDENCE: PROMISE TO PAY. In an action on a fire
 1 policy, where the plaintiff alleges that an adjuster agreed to pay a certain sum in a specified time after proof of loss and no objection to the plea is made, but defendant admits the making of proper proofs of loss, admission of evidence of the adjuster's agreement to pay is not error.

Evidence: OBJECTION: WHEN TO BE MADE. Objection to a portion
 2 of the answer of a witness which is not responsive cannot be first raised on appeal.

Evidence: OBJECTION: VALUE: SEPARATE ITEMS: An objection to a
3 question calling for the reasonable value of property which
enumerates the separate parts but omits a material item, or
where the witness has already given the value of the separate
parts, should be sustained.

Evidence: PREJUDICIAL CROSS-EXAMINATION. In an action on an
4 insurance policy where it is claimed that plaintiff set the fire,
it is error to permit a material witness for the defense to be
asked on cross examination if he had not been accused of burn-
ing a barn.

New Trial: NEWLY DISCOVERED EVIDENCE. Where it is claimed
5 that the assured set the fire and he testifies that he was not
present at the time it occurred, a motion for a new trial on
the ground of newly discovered evidence to the effect that the
assured was at the time in the vicinity of the fire should, in
view of the entire record in the case, have been granted.

Appeal from Pocahontas District Court.—HON. A. D.
BAILIE, Judge.

SATURDAY, MAY 23, 1908.

ACTION at law on a policy of insurance issued to in-
demnify plaintiff against loss or damage by fire or light-
ning on a steam engine, separator, stacker, self-binder,
weigher, and water tank. Trial to a jury, verdict and
judgment for plaintiff, and defendant appeals.—*Reversed.*

J. H. Allen and W. N. Birdsall for appellant.

Heald & Ralston and Frank Farrell for appellee.

DEEMER, J.—The separator, stacker, self-binder, and
weigher covered by the policy of insurance were destroyed
or damaged by a fire which occurred about 9:30 o'clock in
the evening of November 1, 1899. Defendant pleaded
certain false and fraudulent representations made by
plaintiff in his application for insurance concerning the
value, condition, and operation of the threshing outfit,
and averred that the fire was caused by plaintiff himself.

In reply, plaintiff averred that defendant's agent wrote the application, and stated that he was advised by said agent to give the cost price of the machinery as its value; that defendant knew of said representations, and was estopped from disputing the value of the property, or from claiming that the statements regarding value contained in the application were false. These were the issues on which the case was tried, resulting in the verdict hitherto stated.

Defendant admitted during the trial that proper proofs of loss were made by plaintiff, but plaintiff was permitted to testify, over defendant's objections, that the

1. EVIDENCE: adjuster before whom the proofs of loss were
promise to
pay. made promised to pay plaintiff \$420 within

sixty days from that time. As plaintiff alleged such an agreement in his petition, and as there was no attack thereon at any time, there was no error in receiving the evidence. Moreover, part of the answer was responsive to a question which did not indicate

2. EVIDENCE: that any such a promise was called for, and
objection: defendant did not move to strike out the part
when to be made. of the answer which referred to the promise.

The court's ruling on the question was proper, or at least not prejudicial. The answer complained of was not responsive, but defendant did not move to strike it for that reason; hence the trial court had no opportunity to pass upon the question now presented. Defendant does not now attack the sufficiency of the pleading setting up such a promise; hence, in any aspect of the case, the ruling was correct.

II. A witness was asked as to the reasonable value of the threshing outfit, enumerating the constituent parts thereof, at the time the policy was issued. Objection to the question was sustained. There are two

1. EVIDENCE: reasons why the ruling was correct: In the
objection: value separ-
ate items. first place, the question omitted one part of the outfit, to wit, the self-feeder. and an estimate of the

entire property, based on the omission of a material part thereof, would have been of no value and incompetent: (2) the witness had theretofore given his estimate of the value of the separate items of property.

III. A witness introduced by defendant to prove some very material circumstances tending to show that plaintiff set out the fire which destroyed his property was asked on cross-examination by plaintiff's counsel if he had not been accused of burning a barn. This was objected to by defendant, but the objection was overruled, and the witness answered that he had been. This was clearly erroneous, and manifestly prejudicial to the defendant. *Palmer v. R. R.*, 113 Iowa, 442; *Hanners v. McClelland*, 74 Iowa, 318; *State v. Brown*, 100 Iowa, 54. The rule on this question is well understood, and need not be repeated. Appellee attempts to justify on the theory that the admission of the testimony was without prejudice, because of matter elicited on re-examination, whereby defendant's counsel attempted to break the force of the impeachment. We do not think this is true. Of course, defendant's counsel attempted to put the best light on the matter possible, but nevertheless it appeared in the record that the witness had been accused of burning a barn. Surely no argument is needed to demonstrate the effect such a charge might have against one of the defendant's main witnesses.

IV. Newly discovered evidence was one of the grounds of defendant's motion for a new trial. While we should not reverse the case on this ground alone, we think, in view of the entire record, that the motion should have been sustained. The witness whose testimony it is claimed was newly discovered stated in an affidavit attached to the motion that he met the plaintiff near the scene of the fire on the evening of November 1st at about 9 p. m. This was very material evidence, as plaintiff undertook to show that he

4. EVIDENCE:
prejudicial
cross-examination.

5. New trial:
newly discovered evidence.

was many miles away from the scene of the fire. It is true that this witness afterwards said that he did not intend to say that it was plaintiff whom he saw, but that he spoke to the person, calling him by plaintiff's name, and that he thought it was the plaintiff. This, while bearing on the weight of the evidence, does not show its incompetency. Identification is almost always a matter of opinion or belief. The only doubt about the correctness of the ruling on the motion arises out of the showing as to diligence. In view of the peculiar nature of the record, we think it would have been wiser to have sustained the motion for a new trial on this ground alone.

V. Lastly it is said the verdict is without support in the evidence, and that the testimony clearly shows that plaintiff set fire to his own property. In view of a retrial, we do not care to commit ourselves at this time on this issue. Defendant will have the benefit of the testimony of the witness Shine on a retrial, and we may as well await the result of such retrial.

For the errors pointed out, the judgment must be REVERSED.

MARTIN RILEY, Appellee, v. J. E. BELL, Appellant.

False Representations: SALE OF LAND: LIABILITY OF AGENT: IN-

- 1 **STRUCTION.** Where an agent for the sale of land willfully misrepresents the title, and the purchaser, relying upon his statements, is induced to purchase without examination of the title and is defrauded thereby, the agent cannot avoid liability for the loss on the ground that he was acting in a representative capacity, and an instruction embodying this rule is correct.

Fraudulent Representations: LIABILITY OF AGENT: ESTOPPEL. Where

- 2 an agent for the sale of land induces the purchaser to buy by falsely representing that a material fact is true within his knowledge, and damages result, the agent cannot thereafter be heard to say that he in fact had no knowledge of the subject concerning which the representations were made by him.

120 618

130 304

120 618

132 280

120 618

135 684

120 618

137 427

120 618

144 621

False Representations: RELIANCE UPON. In a suit by a purchaser
3 against an agent for falsely representing the title to land he is
selling, the agent cannot be heard to say that the purchaser
had no right to rely thereon.

Fraud of Agent: RECOVERY: REASONABLE CARE. Where one has
4 been induced to purchase land by the willful misrepresenta-
tions of an agent as to the title, a showing that the purchaser
acted as a reasonably prudent man is not a condition preced-
ent to his recovery from the agent for the injury done.

Practice: REVIEW OF ERROR. An error in an instruction on the
5 subject of damages which might have been corrected by the
trial court if attention had been called to the same, cannot be
reviewed when objection is first made on appeal, under Code,
section 4105.

Same. Where complaint is made for the first time on appeal that
6 the court failed to submit an issue raised by the pleadings,
the error will not be reviewed.

Exclusion of Evidence. ERROR: CURED BY VERDICT. In an action
7 for fraudulent representations, error in the exclusion of evidence
in support of a counterclaim for damages for the wrongful
issuance of an attachment based on nonresidence, where the
ground for the attachment is admitted, is cured by a verdict
for the plaintiff.

Appeal from Adams District Court.—HON. H. M. TOWNER,
Judge.

MONDAY, MAY 25, 1903.

ON December 1, 1890, G. W. Frank, residing in the state of Nebraska, was the owner of one hundred and twenty acres of land in Adams county, this state, which land he had placed in the hands of the defendant, Bell, then a real estate agent residing at Corning, in said county, for sale. On the date named, Bell negotiated a sale of the land to plaintiff, and a contract in writing was executed and delivered, the material provisions thereof being that the purchase price should be paid in installments, the last one to become due and payable March 1, 1896; that, upon payment being made in full, conveyance should be made "in

fee simple, clear and free of all incumbrances whatever, by good and sufficient warranty deed." The contract was executed by Frank, in Nebraska, and forwarded to defendant, who delivered the same to plaintiff, and thereafter all payments to be applied on the purchase price were made to defendant by plaintiff. The last payment was thus made in August, 1895, and on November 7th following, a warranty deed, in general form, executed by Frank, was delivered by defendant to plaintiff. It appears that at all the times mentioned the lands in question were in fact incumbered by the lien of a valid recorded mortgage held by one Loomis. During the year 1897 proceedings were instituted to foreclose such mortgage, resulting in a judgment and decree of foreclosure, of date March 22, 1899. This plaintiff was made a party defendant to such action, and he appeared and unsuccessfully defended. On April 24, 1899, plaintiff paid said judgment, amounting to \$2,280.90, and costs, including attorney's fees, \$136.30. This action is brought to recover of the defendant the aggregate of said sums, and is based upon allegations to the effect that, at the time of the purchase of and payment for said land, plaintiff was ignorant concerning the title thereto; that defendant, in response to a request for information as to such title, represented to plaintiff that, of his own personal knowledge, the land was free and clear of all liens and incumbrances whatsoever. And plaintiff says that, relying wholly upon such statement, he purchased and paid for said land without having made a title examination. He further says that the representations so made by defendant were false, and known by him (said defendant) at the time to be so, and were made with intent to cheat, wrong, and defraud plaintiff, and with intent that plaintiff should rely thereon, which he did, to his damage, as stated; that, when he discovered the existence of said mortgage, the said Frank had become and was insolvent, and had no property in this state. The

defendant pleads the fact of his agency. He also denies the fraud, deceit, concealment, and misrepresentations alleged, and denies actual knowledge of the existence of the Loomis mortgage at the time when the contract was made. Such other matters appearing in the record as are material to be considered are stated in the opinion. There was a jury trial, verdict and judgment in favor of plaintiff, and defendant appeals.—*Affirmed*.

Burg Brown, T. M. Stuart, and Maxwell & Maxwell for appellant.

Sullivan & Sullivan and *F. C. Okey* for appellee.

BISHOP, C. J.—It appears from the record that the defendant was for many years a business man at Corning, the seat of Adams county, and well known to plaintiff; that the latter is an aged farmer, having little or no education, and who resides near Corning; that defendant, acting as the agent of Frank, negotiated the sale of the land in question to plaintiff, and at the time thereof such land was incumbered by the lien of the Loomis mortgage; and that at the time of making the contract, and of his payments thereunder, plaintiff had no actual knowledge of the existence of such mortgage. We think it further appears—and the jury found such to be the fact—that, to induce plaintiff to enter into the contract, defendant asserted that he had personal knowledge of the condition of the title to the lands, and that such title was perfect in all respects. The representations made by defendant, as testified to by plaintiff and other witnesses in his behalf, were, in substance, as follows: Pending the negotiations for the sale, plaintiff said: "Mr. Bell, I will buy the land if it is clear of everything. I don't want to buy anything unless it is clear, and I want to buy of you." To which defendant responded: "All right. It is clear of everything. I have looked up the record, and it is clear of everything."

Again, at the time the contract was signed, defendant said that he had examined the records, and that the land was clear and free of all incumbrances. This he repeated several times. Being asked about an abstract of title, defendant answered that, if an abstract was furnished, plaintiff would have to pay for the same, whereupon plaintiff said: "All right. I will pay for the abstract, if that is all." To this defendant replied: "Look here. There is no use of your paying for an abstract, because the land is clear, and you are just throwing away that money." Plaintiff says, and the jury accepted his statement as true, that he believed and relied upon the statements so made by defendant, and accordingly did not cause an examination of the title records to be made. As a witness on his own behalf, the defendant denied having knowledge of the existence of the mortgage at the time the contract was made, and denied making the statements attributed to him.

The court, upon its own motion, gave to the jury an instruction as follows: "(5) It is not sufficient to show that the representation was made, and made to induce the sale, and that said statement was in fact untrue. *It must further appear that the defendant knew said statement was untrue when he made it, or he must have asserted that he had actual knowledge, or intended to convey the impression that he had actual knowledge, of the truth of the statement made, although conscious that he had no such knowledge.* It is admitted that defendant was the agent of Frank, and so acted in the transaction. It is also admitted that plaintiff knew that defendant was acting for Frank, and not for himself. Under these circumstances, a mere assertion or representation concerning the said land would be presumed to be made for and on behalf of the principal, and the agent would not be liable for any such assertion or representation, concerning said land *unless, such agent in making such statement, knew at the time he*

was making it that the statement was false and untrue, or that he made such representation assuming and asserting that he had personal knowledge, when in fact he had not."

(The italics are ours.)

To the giving of such instruction the defendant saved an exception, and he now assigns error based thereon. The particular grounds of complaint have reference to the

italicized portions of the instruction. It is contended in the first place that the instruction is erroneous in that the representations alleged, conceding the same to have been

made, were the representations of the principal, and, under the circumstances presented, he alone became bound thereby. In support of this proposition, counsel invoke the general rule to the effect that where an agent has acted in good faith, and within the limits of his authority, his principal alone is bound by his representations, however false the same may prove to be in point of fact. The force of such rule, as applied to a state of facts coming within the field of its operation, is not to be denied. But it will be observed that the element of good faith is essential to the rule, and it follows, of necessity, that, in a case dominated by bad faith or fraud on the part of the agent himself, the rule can have no application. The rule thus invoked by counsel is confined in its application to such representations, and such only, as may be made by an agent, speaking as such, for and on behalf of his principal. Thus it is that an agent is not chargeable with personal responsibility where it appears that he has acted in good faith within the general scope of his authority, and in making representations has acted simply as the mouthpiece of his principal, and has spoken, therefore, as his principal might have spoken, had he been personally present and acting in the premises. The thought of the instruction under consideration is that bad faith and fraud—that is, a conscious and willful misrepresentation

1. FALSE representation:
sale of land:
liability of
agent: instructions.

of a fact—are essential to a recovery as against the agent in any event. In effect, therefore, the jury is told that, unless bad faith is made to appear, the plaintiff must fail in his action, and a verdict should accordingly be returned in favor of defendant. Now, that a personal liability may be charged as against an agent where fraud or bad faith on his part is alleged and proven, is well-settled doctrine. *Lyon v. Tevis*, 8 Iowa, 79; *Paton v. Lancaster*, 38 Iowa, 494.

This doctrine is bottomed upon the principle that any person who by himself perpetrates a fraud, or who makes himself a party with others to the commission of a fraud, may be held personally liable for the natural consequences or proximate results flowing therefrom. It follows that one who sustains the relation of agent cannot escape liability for his fraudulent acts, willfully committed while in pursuit of the master's business, by merely pointing out the fact of his agency. *Norris v. Kipp*, 74 Iowa, 444; *Delaney v. Rochereau*, 44 Am. Rep. 456; *Berghoff v. McDonald*, 87 Ind. 549; *Hedden v. Griffin*, 136 Mass. 229 (49 Am. Rep. 25); *Campbell v. Hillman*, 61 Am. Dec. 195; Mechem on Agency, section 571. Here bad faith and fraud are charged against the agent personally, and there is evidence in the record tending to support such allegation. The criticism of the instruction thus made is therefore without merit.

A further attack is made upon the instruction for that no reference is made therein to the necessity of proof of *scienter*. It may be conceded that, in an ordinary action for deceit by means of false and fraudulent representations, proof of *scienter* is essential. This is the general rule, and has been adhered to by this court in a line of cases beginning with *Holmes v. Clark*, 10 Iowa, 423, and ending with *Boddy v. Henry*, 113 Iowa, 462. But we think such rule cannot be accepted as controlling in a case such as we now have before us. Where the wrong complained of is that

2. FRAUDULENT representations: liability of agent estoppel.

the defendant has induced the plaintiff to act by falsely and fraudulently representing that a certain material fact is true, within his personal knowledge, and injury and damage result therefrom, both reason and authority unite in dictating the wholesome doctrine that he shall not be heard thereafter to assert that in fact he had no knowledge upon the subject concerning which the representation was made by him. Such was directly our holding in *McKown v. Furgason*, 47 Iowa, 636. The principle finds support, also, in the following authorities: *Bondurant v. Crawford*, 22 Iowa, 40; *Gardner v. Trenary*, 65 Iowa, 646; *Clafflin v. Assur. Co.*, 110 U. S. 81 (8 Sup. Ct. Rep. 507, 28 L. Ed. 76); 14 Am. & Eng. Ency. (2d Ed.) 120; Cooley on Torts, 498. The rule announced in *Boddy v. Henry*, *supra*, is not antagonistic to the doctrine of the *McKown Case*. In writing his opinion, McClain, J., had the *McKown Case* before him, and finds in what is there said a qualification of the general rule, rather than the announcement of a doctrine in opposition thereto. In the *Boddy Case* it is said that "intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit." And this may be accepted as correct doctrine. It is the purpose to commit a fraud that gives rise to the rule authorizing damage to be recovered for a deceit, and hence the necessity for proof of the *scienter*; that is, knowledge of the falsity of the statement on the part of the person making the same. Were it not that, to be actionable, the fraud must be born of intention, then it would be that prosecutions for deceit could be predicated upon any misrepresentation designed to influence the conduct of another, however the mistake may have arisen, or however honestly the representation may have been made. But where the statement complained of is accompanied by a direct, but false, assurance that the truth thereof is personally known to the person

making the same, the reason for the general rule, in so far as it requires proof of actual knowledge, can have no application. In such case the person making the representation at least knows that his statement of personal knowledge is false, and therefrom an intentional fraud is easily to be presumed. There can be no variance in the principle upon which one is held liable for damage who asserts the existence of a fact, knowing that in truth it does not exist, and that upon which a like responsibility is visited upon one who, conscious that he is ignorant concerning the subject-matter of which he speaks, still falsely asserts that, within his own personal knowledge, a fact stated by him does in truth exist. In each instance an intentional fraud is manifest, and it is of this that the law takes note, and for this it affords a remedy.

But appellant says that, conceding even the making of the representation alleged, the instruction was erroneous, in that no recovery should be allowed, inasmuch as

3. FALSE representations: plaintiff had no legal right to rely upon such representation, and so make no further effort to ascertain the real condition of the title to the lands.

In this we do not agree. If defendant in fact knew the condition of the title, it was his duty to truthfully represent the same, if he essayed to speak at all upon the subject. If he did not know the condition of the title, it was his duty to frankly avow that fact, if he essayed to speak at all. Here the charge is that he claimed to have personal knowledge to the effect that the title was perfect. Now, if plaintiff acted upon such representation in good faith, and to his damage, both reason and authority unite in authorizing a recovery for the damage thus sustained. Under the circumstances here presented, we think it does not lie in the mouth of one charged with such a fraud to say that an examination of the county records would have disclosed his untruth and laid bare his attempted fraud. Where one is shown to have made statements of the char-

acter here in question, the law presumes that he intends that the same shall be relied upon. If the party to whom they are made does in good faith rely thereon, he may recover, notwithstanding it may appear that opportunities were open to him to ascertain the truth by investigation and examination. As applied to a case such as we have before us, it is well settled that one who, to advance his own interests, falsely asserts the existence of a state of facts, knowing the other party to be ignorant, cannot complain if he is believed.

II. Complaint is made of the sixth instruction as given by the court. Therein the jury is told that, in any event, it must be made to satisfactorily appear that the plaintiff believed and relied upon the representations alleged to have been made. The instruction then calls attention to the fact

4. FRAUD of agent: recovery: reasonable care.

that the mortgage in question was a matter of record in said county, and concludes as follows: "Under ordinary circumstances, the record imparts and presumes notice, and a person is supposed to know what he might with reasonable diligence have discovered. Under ordinary circumstances, it is likewise the duty of the person who is about to purchase land to examine the records, and if he neglects to use the means which are thus placed at his disposal for his protection, and a loss occurs, he is not allowed to set up his own negligence and want of diligence to reimburse him for such loss. But *in cases such as the plaintiff asserts in the case at bar, where such examination is not made by reason of affirmative allegations regarding the condition of the title, such ordinary rules do not apply, providing it appears that such statements are believed and relied upon, and the other elements necessary to warrant recovery are established.*" That it is the duty of every person to use ordinary care and prudence in the transaction of his business affairs is undoubtedly true, and, generally speaking, if he neglects to make use of

such means as are at his disposal, and a loss occurs, he is to be held remediless. To say otherwise would be to hold out an inducement or reward for negligence and want of diligence. *Gee v. Moss*, 68 Iowa, 318; *Longshore v. Jack*, 80 Iowa, 298; *Ladner v. Balsley*, 108 Iowa, 674.

It is the contention of counsel for appellant that it was incumbent upon plaintiff to prove not only that the representations were made as alleged, and that they were believed and relied upon, but that he must go farther, and show to the satisfaction of the jury that under all the circumstances, and as a matter of fact, he acted as a reasonably prudent and careful man in thus believing and relying. And it is said that the instruction is erroneous in that negligence or want of care and diligence on the part of plaintiff, as a question of fact, material and proper to be submitted to the jury, was thereby ignored, and, in effect, determined upon by the court as a proposition of law. The instruction, as a whole, tells the jury that it is incumbent upon plaintiff to prove the making of the false representations alleged, and that they were made with intent that they should be believed and relied upon; that he (plaintiff) did in fact believe and rely upon the same, and acted in accordance therewith. As applied to this case, the contention of appellant accordingly narrows down to this: Where one is charged with making false representations, intending that such should be believed and relied upon, and which were believed and relied upon, may he demand proof, as a condition precedent to fixing upon him a liability for resulting damages, to the effect that the person whom he has thus deceived and damaged acted as a reasonably prudent man in taking him at his word, and acting upon faith of his truthfulness? The mere statement of the question, as it seems to us, is sufficient to clearly indicate the appropriate answer. It would be absurd—nay more, a travesty—to say that one who, to accomplish his own ends, by willful fraud has induced

another to act to his damage, may demand that the question of his liability shall be made to depend upon whether or not his victim would have gotten tangled in the net purposely spread for him, had he acted as an ordinarily prudent man. One who induces another to walk in the way of a pitfall, ought not to be absolved from liability for a resulting injury, even though he might, if permitted to do so, convince a jury that his scheme would not have been successful, had his victim displayed ordinary business judgment.

III. The jury was instructed that, if the plaintiff was found entitled to recover, the verdict in his favor should be for the sum of \$2,424.80. This sum, it will be noticed, corresponds with the sum paid by plaintiff to satisfy the judgment in the foreclosure suit, including costs and attorney's fee. The giving of such instruction is assigned as error. The specific complaint made is that the costs of the foreclosure suit, including attorney's fee, were improperly included in the sum named in the instruction. Appellee now calls attention to the fact that, as shown by the record, the point here contended for is presented for the first time in this court. It is a rule of the statute—and we have repeatedly held in conformity therewith—that a judgment may not be reversed for an error which could have been corrected on motion in the trial court, until such motion has been there made and overruled. Code, section 4105; *Garvin v. Cannon*, 53 Iowa, 716; *Richman v. Board, etc.*, 70 Iowa, 627; *Ketchum v. Larkin*, 88 Iowa, 215. Should we concede that plaintiff, as a matter of right, ought not to be permitted to recover in this action the amount of the costs in the foreclosure suit paid by him, and that the instruction was erroneous to that extent, still it is clear that relief cannot be had in this court, as the error, if such there was, might have been corrected, on motion, in the trial court. The incorrect amount, if such it be, may have been in-

5. PRACTICE:
review of
error.

serted by accident or oversight, or under a mistaken apprehension of the law or the facts. In any event, it was the duty of defendant to call attention thereto by way of motion for new trial, or otherwise, and thus afford opportunity for correction. The mere taking of an exception is not sufficient, where the specific point contended for is not called to the attention of the court, and a ruling had directly thereon.

In this connection we may dispose of another assignment of error, and much that has been said above has application thereto. As one of his defenses, the defend-

ant pleads the bar of the statute of limitations; it being alleged that plaintiff's cause of action accrued more than five years prior to the time the action was commenced. No request was made for an instruction to the jury having relation to such ground of defense, and no reference was made thereto in the statement of the issues, or in the instructions given the jury by the court on its own motion. The failure of the court to submit the issue so tendered, under proper instructions, is assigned as error. As an abstract proposition of law, it may be conceded that it was the duty of the court, without request, to submit to the jury, under proper instructions, each of the several defenses tendered concerning which any dispute of fact was presented by the record. The failure to request is material only in the sense presently to be noticed. The record before us further discloses that no objection was made, or exception taken, based upon the error or omission now complained of; nor was the subject-matter presented to the trial court after verdict by motion for new trial or otherwise. The omission is complained of for the first time by way of assignment of error in this court. In view of the statutory provision and our previous holdings, to which we have already called attention, it is manifest that we cannot consider the same. Had a request for instruction been presented and refused;

had the motion for new trial made reference to the omission; had objection been made in any form, and the same ruled upon—the record might have presented a question for our determination. As the record presented contains no reference to an adverse ruling, nor to an exception saved, and as both are essential as a basis for an assignment of error, we cannot consider the question thus made.

IV. In the petition it is alleged that defendant is a nonresident of the state of Iowa, and a writ of attachment is prayed for. With his answer the defendant presented

7. EXCLUSION
of evidence:
error cured
by verdict. a counterclaim, in which it is alleged that at the time of the commencement of plaintiff's action a bond for attachment was filed, a copy of which is set forth, and that, based thereon, a writ of attachment was issued, and levied upon his property. Defendant admits the fact of nonresidence alleged, but he says that the attachment was wrongful, in that he was not in any manner indebted to plaintiff at the time. The character and extent of the damages sustained by him are set forth, and judgment on the bond demanded. By way of reply to such counterclaim, the plaintiff pleaded a general denial. As a witness on his own behalf, the defendant was asked the following questions: "Q. What do you know about losing any sales, or any damages that have arisen to you, by reason of this attachment?" "Q. State whether or not it was necessary for you to come here to defend against this action?" "Q. How far did you have to come to attend this trial?" "Q. What were your expenses in coming here to defend against these attachment proceedings?" Each of the foregoing questions was objected to as incompetent, irrelevant, and immaterial, and the objections were sustained. Such was the only evidence offered by defendant in support of the averments of his counterclaim. The objections thereto may properly have been sustained for the following, if for no other reason: The reply put in issue every fact alleged in the counter-

claim, and defendant thereby became bound to make proof of all material facts alleged. In view of the entire absence of preliminary proof concerning the issuance and levy of the attachment, it is manifest that evidence as to the character or extent of damage might well be regarded as improperly offered. But if this were not so, and conceding, for the purposes of this case, that the matters of damage sought to be proven were proper in character, still, in view of the verdict found by the jury, the defendant is in no position to complain. The attachment was grounded simply upon an allegation of nonresidence, and this was confessed. At best, therefore, defendant could recover damages only in the event that plaintiff should fail of a recovery upon the cause of action alleged by him. It follows that the error, if any there was, was cured by the verdict returned by the jury.

V. Complaint is made of misconduct on the part of the jury. We have read the record carefully, and, in our opinion, no sufficient showing of misconduct, resulting in prejudice, appears. We have also examined the several assignments of error based on rulings connected with the introduction of the evidence in the case, and find no prejudicial error.

We think the judgment was warranted by the evidence, and finding no error it is **AFFIRMED**.

MALLORY COMMISSION COMPANY, Appellant, v. R. M. ELWOOD,
Appellee.

Sales: BREACH OF WARRANTY: PLEADING. A counterclaim for
1 breach of warranty in sale of sheep is not objectionable because of items for care, feed and expense of keeping. The question of whether the breach of the warranty is the proximate cause of the damage being one of proof and not of pleading.

Pleading: BREACH OF WARRANTY: FAILURE OF CONSIDERATION:
2 **ELECTION.** In an action on a note given for the purchase price

of sheep, defendant may plead both a breach of warranty and failure of consideration, and cannot be required to elect upon which he will rely.

Evidence: IMPROPER OBJECTION. The relevancy of testimony cannot be considered on an objection which simply goes to the competency of the witness.

Non-Prejudicial Evidence. The admission of the testimony of a witness as to his understanding of an agreement is not error where no prejudice results.

Practice: RELEVANCY OF ARGUMENT. An argument on appeal, not addressed to the questions raised on the trial, will not be considered.

Waiver: RENEWAL OF NOTE: EVIDENCE. The making of renewal notes is presumptive evidence of a waiver of any defense to the indebtedness, but is not conclusive.

Evidence: MOTION TO STRIKE. A party cannot permit evidence of a local custom to be received without objection and afterwards have it stricken on motion.

Sale: AUTHORITY OF AGENT: CUSTOM. One dealing with an agent may in the absence of notice of limitations assume that he has authority to sell according to the local custom.

Evidence: OBJECTION OF OPPOSITE PARTY: REVIEW ON APPEAL. Where a party fails to take an exception to a ruling or remark of the trial court regarding the admissibility of evidence, or to raise the question on a motion for a new trial, he cannot insist upon the error in the appellate court based on an objection made by the opposite party.

Appeal from Jones District Court.—HON. H. M. REMLEY, Judge.

MONDAY, MAY 25, 1903.

ACTION at law on two promissory notes given for the purchase price of certain sheep. Defense, failure of consideration, due to the diseased condition of the animals when sold, and a counterclaim for damages for breach of warranty of the sheep made at the time of the sale. Trial to a jury. Verdict and judgment for defendant, and plaintiff appeals.—*Affirmed.*

S. W. Norton and Cash & Rhinehart for appellant.

F. O. Ellison for appellee.

DEEMER, J.—While there are some nineteen assignments of error, but few of them are sufficient under the statute and decisions of this court to present any question for review. The assignments with reference to the instructions and special interrogations given and refused are omnibus in character, and clearly insufficient under the rule announced in *Huss v. C. & G. W. R. R.*, 113 Iowa, 343; *Fitch v. Mason City*, 116 Iowa, 716, and other like cases. There is nothing, therefore, for us to consider with reference to these matters. The third assignment is omnibus in character, and also requires us to search through the record for the alleged errors. The sixth is omnibus in character, and insufficient. Nine and ten refer to rulings on page thirty-three of abstract, but no rulings are set out on that page. The motion for a new trial was based on fifteen distinct grounds. There is one omnibus assignment of error challenging the overruling of this motion, based on five alleged reasons. This is also insufficient. *Sisson v. Kaper*, 105 Iowa, 599; *Shoemaker v. Turner*, 117 Iowa, 340, and cases cited. Giving the appellant the benefit of every doubt, the only assignments which we may consider are 1, 2, 5, 7, 8, 11, 12, 13, and 19. These we shall determine in their order.

It will be observed from the preliminary statement of the case that defendant pleaded a counterclaim for damages suffered by him by reason of a breach of warranty in the sale of the sheep. He asked that he should be allowed as part of his damages for the care, feed, and expense of keeping the sheep for about one year, amounting to \$1,000. Plaintiff moved to strike out these items for the reason that same are incompetent, irrelevant, and immaterial, and for the

I. SALES:
breach of
warranty:
pleading.

further reason that the action herein is upon a breach of warranty, and special damages cannot be recovered in such an action; and that the only measure of recovery is the difference between the contract price and the value of the property in the condition in which the defendant received it. The motion was overruled, and exception taken. This assignment does not seem to be argued, hence we shall not consider it. In any event, the ruling was correct under the doctrine announced in *Joy v. Bitzer*, 77 Iowa, 74. Whether or not defendant was able to show that these damages were the proximate result of the breach of warranty was a matter relating to the proof, and not to the pleadings.

In addition to filing a counterclaim for breach of warranty, defendant pleaded failure of consideration for the notes, due to the diseased and worthless condition of the

2. PLEADING: breach of warranty: failure of consideration: election. sheep. Before the trial commenced, plaintiff moved the court to require defendant to elect whether he would rely on failure of consideration or breach of warranty. This was overruled, and of this complaint is made. There was no error in the ruling. *Thorson v. Baker*, 107 Iowa, 49.

In the fifth assignment it is said the court erred in permitting defendant to prove a local custom to warrant sheep. Turning to the abstract at the page indicated, we

3. EVIDENCE: improper objection. find the only ruling was as follows: "Robert Elwood, recalled, testified as follows: 'I know the custom down in that county in '98 and '99 with reference to guaranteeing sheep to be free from disease.' Q. And sound and all right? (Plaintiff objects to the question as incompetent, the witness not having shown that he is competent to testify, not having any experience in the business of buying and selling sheep, except as to one particular transaction. Overruled; plaintiff excepts)." The objection manifestly goes to the competency of the witness, and not to the relevancy of his testimony. No

such question as is argued seems to have been presented to the trial court. Moreover, the assignment is not argued except in the most general way. Indeed, it is conceded that evidence of custom is admissible in such cases. The exact claim is that the court did not properly instruct with reference to this testimony, but that question cannot, for the reasons already stated, be considered.

The next alleged error is shown by the following excerpt from the record: "When I went to sign the mortgage, before I signed it and the notes, I says, 'Now,

4. NON-PREJUDICIAL evidence,

supposing these sheep should not get all right,' I says, 'they are on the mend now, and seem to be getting all right.' Mr. Hull says: 'You don't need to worry about that. Them sheep are going to get all right, and they will make you plenty of money yet;' and he says, 'If they don't get all right, you won't need to suffer any for it.' Q. What further did he say, if anything, about that? A. Well, I believe that was about all of our conversation—all I remember. I signed up the notes and mortgages. Q. With that understanding between you? A. Well, that was my understanding of it; yes, sir. (Plaintiff moved to strike out answer as incompetent and immaterial as to what the understanding was. Motion overruled, plaintiff excepts.)" While the "understanding" of a witness is not ordinarily competent, it is manifest that the term, as here used, meant "agreement," and was intended as giving the witness' reason for signing the notes in suit, which were renewals of the ones originally given for the sheep. In any event, no prejudice resulted.

This quotation from the record shows the next matter complained of: "Q. Now, Mr. Elwood, taking it along there, and from your knowledge of what you did in connection with those sheep, what you have described here, do you know what it was worth per month to take the sheep and care for them and feed them as you fed them

there for the time you had them? (Plaintiff objects to the question as calling for incompetent testimony, for the reason that it calls for the value of what he did, instead of the reasonable value of such services; and for the further reason that it is not shown that the witness is competent to testify, having already testified that he had no experience in sheep business.) 'He may answer that question "Yes" or "No." ' (Plaintiff excepts.) A. Well, I know very closely. Q. State what would be the fair reasonable value for the service and feed and care which you have bestowed upon those sheep per head per month for the time you had them? (Plaintiff objects to the question for the reason the witness has shown and testified he is not competent to testify, and having had no experience in sheep business, and the measure of recovery is not the amount of work he did, but the reasonable value of such work per month or per day. Objection overruled, and plaintiff excepts.)" continuing, witness testified: "Judging from my experience, and figuring how much feed it takes to feed the sheep, I think it was worth, at a low estimate, twenty-five cents per month while a person is feeding grain and hay the way I fed in the winter time. I fed them grain and hay about six months. The rest of the time they were on the pasture. Q. Do you know what the fair reasonable value was for the pasturing of those sheep during the six months you had them there, including the care that you were called upon to give them and the treatment? (Plaintiff makes same objection—he groups two matters together. Objection overruled. Plaintiff excepts.)" The argument is addressed not to the form of the questions or to the competency of the witness, but to the abstract proposition of the right to recover such matters in

5. PRACTICE: an action for breach of warranty. Manifestly,
relevancy of
contract. no such question was presented by the foregoing objections. Again, the argument is addressed to certain instructions, and not to these specific rulings.

At the close of defendant's evidence, plaintiff moved for a verdict on the theory that, as defendant renewed the notes originally given for the sheep, he was concluded and estopped thereby from making any such defenses to the notes as were interposed by him. While the making of these renewal notes was presumptive evidence of a settlement and waiver of a defense, it is not conclusive. *Lindsey v. Moore*, 101 Iowa, 592. Under the evidence we have quoted regarding the statements made at the time the note was renewed, it was a question for the jury as to whether there had in fact been a settlement or a waiver of the defenses. This is practically conceded by plaintiff's counsel, but they say the instructions were faulty. These we cannot consider.

The twelfth and thirteenth assignments of error read in this wise: "(12) The court erred in overruling plaintiff's motion to take from the jury the defense part of defendant's answer, and said ruling was erroneous for the reason that defendant, by electing to counterclaim for his damages, had ratified the note and contract, and for the other reasons stated in the said motion. (13) The court erred in overruling plaintiff's motion to strike out all the testimony as to warranty, and said ruling was erroneous for the reason that said testimony was immaterial on the question of failure of consideration, and no affirmative relief could be had thereon without showing authority of the agent to make same, and other reasons stated in said motion." The point raised by No. 12 we have already considered in dealing with plaintiff's motion to require defendant to elect. The thirteenth should not be considered for the reason that the points therein suggested were not raised by the motion. The motion was as follows: "The plaintiff further moves the court, subject to the above motions, to exclude from the jury any testimony as to warranty, for the reason that it is not shown that the plaintiff's agent at said time of said

6. WAIVER: re-
newal of
note.

7. EVIDENCE:
motion to
strike.

sale had any authority to warrant said sheep, and that his action on the counterclaim can only be maintained by showing that the agent had authority to make said warranty. (Motion overruled. Plaintiff excepts.)" Moreover, the exact point made by the motion is not argued. Further, the evidence as to local custom in the community where the sheep were sold to give warranties was received without objection, and plaintiff could not well wait until near the close of the trial, and then move to strike it. In any event, *Kaufman v. Farley*, 78 Iowa, 679, seems to be conclusive on the question. See, also, *Hirschorn v. Bradley*, 117 Iowa, 180; *Austrian & Co. v. Springer*, 94 Mich. 343 (54 N. W. Rep. 50, 34 Am. St. Rep. 350); *Bailey v. Bensley*, 87 Ill. 556; Mechem on Agency, sections 281, 485, 989, and cases cited.

Authority is presumed to have been conferred upon the agent in contemplation of all well-defined and publicly known usages of the place where the agent was to operate, and third persons dealing with such agent were justified in assuming, in the absence of notice of limitations, that the agent had power to make sales in accord with these customs or usages. Lawson's Usages and Customs, pages 284, 285.

The last assignment relates to a remark made by the trial court in ruling on evidence. Plaintiff offered in evidence a chattel mortgage on the sheep, made to it by defendant, which stated that the animals were at the time the notes were given in perfect health, and in the possession of the defendant. Defendant objected to this instrument as incompetent and immaterial. The court remarked in ruling: "It has a bearing as to whether or not it was the custom to warrant the health of cattle or sheep at the time of the sale. (Objection overruled, and defendant excepts.)" The remark of the court is complained of by plaintiff. It will be noticed that the mortgage was re-

8. SALE: authority of agent: custom.

9. EVIDENCE: objection of opposite party: review on appeal.

ceived in evidence, and that it was defendant's objection which was overruled. Plaintiff did not except either to the ruling or to the remark made by the court. Moreover, the attention of the court was not called to this matter in the motion for a new trial. It has, therefore, never had the opportunity to pass upon the same. This being true, the matter cannot now be considered by this court. Code sections 4105, 4106, and cases cited. In any event, there was no prejudice. *Cedar Rapids v. Cowan*, 77 Iowa, 535.

These are the only matters which upon the most liberal interpretation of our statute and decisions may be considered, and, finding no prejudicial error in any of them, the judgment must be and it is **AFFIRMED**.

MARIAN AMES, Administratrix of the Estate of David B. Ames, Deceased, Appellant, v. WATERLOO & CEDAR FALLS RAPID TRANSIT COMPANY.

Street Railways: PERSONAL INJURY: EVIDENCE. In an action against

- 1 a street railway company for an injury resulting in death, it appeared that several covered wagons following each other were passing along a street in close proximity to the car track. Deceased stepped from behind the last of these upon the track and was struck by a car. There was evidence showing that the car was running at an unlawful speed, but there was no evidence of the exercise of care by deceased at the time of the injury, the circumstances surrounding the accident, however, were shown. *Held*, that a verdict for defendant was properly directed.

Instinct of Self Preservation: PRESUMPTION. The presumption

- 2 that deceased, prompted by the instinct of self-preservation, was exercising due care for his own safety at the time of the accident does not obtain where there is direct evidence of the circumstances surrounding the injury.

Contributory Negligence: PRESUMPTION. One who is struck by a moving street car while crossing the track in full possession of his senses, with an unobstructed view of the track and in no way

120	640
122	493
120	640
1125	657
120	640
129	252
120	640
d132	581
120	640
d141	700
120	640
143	433
e143	434

distracted or interfered with so that by looking and listening he might have avoided the danger, is conclusively presumed to be guilty of contributory negligence.

Reasonable Care. In crossing a street car track, one is bound to
4 know that cars are likely to pass and to take reasonable care to avoid the injury.

Reasonable Care: OBSTRUCTED VIEW. Where a view of the track
5 is obstructed by an object in such close proximity thereto that an unobstructed view for any considerable distance between the time of passing the obstruction and coming upon the track is impossible, it is the duty of one attempting to cross under such circumstances to stop, if necessary, and employ his natural faculties in an effort to avoid the danger.

Instinct of Self Preservation: EVIDENCE. A presumption of the
6 exercise of the instinct of self-preservation does not constitute affirmative evidence of the existence of facts prior to, and remote from the time of the accident.

Reasonable Care: WHEN TO BE EXERCISED: PRESUMPTION. It was
7 necessary for deceased to exercise care at the time of crossing the track, and where the evidence shows a want of such care, it is not overcome by a presumption of its exercise at some other time.

WEAVER, J., and DEEMER, J., dissenting.

Appeal from Black Hawk District Court.—HON. F. C. PLATT, Judge.

MONDAY, MAY 25, 1908.

ACTION by plaintiff, as administratrix, to recover damages for the death of her intestate, David B. Ames, caused by a collision between him and a street car operated by the defendant company. At the close of the evidence the court instructed the jury to return a verdict for defendant, and from judgment thereon plaintiff appeals.—*Affirmed.*

Reed & Tuthill for appellant.

Mullan & Pickett and *D. T. Gibson* for appellee.

McCLAIN, J.—It may perhaps be assumed, from the hour of the day and the place and the street where the
VOL. 120 IOWA.—41.

accident occurred, that deceased had left his work at the noon hour, and was passing diagonally northwestward across Fourth street, which runs in front of the railroad shops, where he was employed, to reach a street intersection on the other side on his way home. No witness actually testifies to having seen him until the very moment of the accident. It appears that five or six covered wagons,

1. PERSONAL
injury: evi-
dence.

described as "movers' wagons," were following one after the other southward on Fourth street, close to the street railway track, and that deceased stepped from behind the last of these wagons towards the track, and was struck by a car of defendant, coming from the south, just as he stepped upon, or was about to step upon the track to pass across it. Deceased died the next morning as the result of injuries received in the accident. The evidence tended to show that defendant's car was being operated at a greater rate of speed than the maximum fixed by ordinance. There is no evidence that any care was exercised by deceased to avoid collision with the car, and it is contended that the trial court properly directed a verdict for defendant on the ground that it did not appear that at the time of the accident deceased was in the exercise of due care with reference to his own safety. Had there been no evidence whatever as to the circumstances surrounding the deceased at the time his injury

2. INSTINCT of
self preservation:
presumption.

was received, or as to how the accident occurred, the presumption would be entertained that, prompted by the instinct of self-preservation, the deceased was taking reasonable precautions for his own safety. But several witnesses saw deceased just as he stepped forward from behind the moving wagon and was struck by the car, and the fact that there was such evidence as to what occurred prevents the presumption which would otherwise be drawn from the instinct of self-preservation from being entertained. *Bell v. Incorporated Town of Clarion*, 113 Iowa, 126.

The question for us to determine, then, is simply whether, under the evidence, there is anything tending to show freedom from contributory negligence on the part of deceased which made it necessary that that

3. CONTRIBUTORY negligence: presumption.

question should be submitted to the jury. It is well settled that one who is struck by a moving car while attempting to cross the track on which the car is moving, and who at the time is in full possession of his senses, and has an unobstructed view of the track, so that by looking and listening he might have avoided the approaching car, and is in no way distracted nor interfered with by surrounding circumstances or conditions either in seeing the car or avoiding it, is conclusively presumed to be guilty of contributory negligence. *Beem v. Tama & T. Elec. R. L. Co.*, 104 Iowa, 563; *Creamer v. West End Street R. Co.*, 156 Mass. 320 (31 N. E. Rep. 391, 16 L. R. A. 490, 32 Am. St. Rep. 456); *Cawley v. La Crosse City R. Co.*, 101 Wis. 145 (77 N. W. Rep. 179); *Smith v. City & Suburban R. Co.*, 29 Or. 539 (46 Pac. Rep. 136, 780); *Everett v. Los Angeles Consolidated Electric Co.*, 115 Cal. 105 (43 Pac. Rep. 207, 46 Pac. Rep. 889, 34 L. R. A. 350). While a street car company does not have the ex-

4. REASONABLE care.

clusive right of way on its tracks in a city in the same sense that a steam railroad company has the exclusive use of its right of way at places other than a highway crossing, nevertheless a person attempting to cross a street car track is bound to know that cars are likely to pass on such track, and is bound to take reasonable care to avoid injury by their coming in contact with him. *Bailey v. Market Street Cable Co.*, 110 Cal. 320 (42 Pac. Rep. 914); *Smith v. Electric Traction Co.*, 187 Pa. 110 (40 Atl. Rep. 966).

It is contended for the appellant, however, that in the present case deceased was not in a situation to see the approaching car, by reason of the obstruction to his view offered by the moving wagons, until he had gone into a

place of danger. But it is to be noticed that there was nothing in the proximity of the wagons to distract his attention, or make it necessary for him to exercise a judgment in avoiding any danger other than that to be apprehended from an approaching street car. The wagons were moving, and he was behind the last one. He was, as it were, in a place of retreat, where he was perfectly safe from any danger to be apprehended, except such as might result from his going upon the street car track. *Terien v. St. Paul City R. Co.*, 70 Minn. 532 (78 N. W. Rep. 412); *Hickey v. St. Paul City R. Co.*, 60 Minn. 119 (61 N. W. Rep. 893). By looking or listening he could have discovered, before putting himself in danger, whether a car was approaching, and we think there can be no question as to his duty to take such precaution for his own safety.

Where a passenger, after alighting from a street car, passed round the end of the car, and came into collision with a car on another track, it was held that such person was, as matter of law, chargeable with contributory negligence such as to defeat recovery. *Smith v. City & Suburban R. Co.*, 29 Or. 589 (46 Pac. Rep. 136, 780). So, where one approached a street car track back of a row of trees extending along the track, which obstructed his view, it was held that, as matter of law, he was negligent in not stopping to look or listen for a car when he passed the end of the row of trees and went upon the track. *Kelly v. Wakefield & S. Str. R. Co.*, 175 Mass. 331 (56 N. E. Rep.

285). In this last case it is conceded that it is not in all cases essential to stop for the purpose of looking and listening when about to go upon a street car track; but in that case, as in this, the obstruction was so close to the track that there could not have been an unobstructed view for any considerable distance between the time of passing the obstruction and coming upon the track, and the court held that it was the duty of plaintiff, "knowing that he could not see a car,

5. REASONABLE
care: ob-
structed
view.

which was behind the trees, and knowing that a car might have passed in behind the trees before he looked," as he approached the track, to stop, if necessary, to discover whether there was danger before going upon the track, and that he was negligent in not taking "any pains to see that such a car had gone by before he drove onto the crossing, or was so near to it that some accident was inevitable." So here we are compelled to say that the deceased was conclusively guilty of negligence in that he went from behind the obstruction of the moving wagon into a place of danger without taking any precaution whatever to anticipate or avoid the danger incident to his own act. The duty of deceased was to "pay attention to his surroundings and employ his natural faculties and exert due diligence to avoid such danger." *Everett v. Los Angeles Consolidated Electric Ry. Co.*, 115 Cal. 105 (48 Pac. Rep. 207, 46 Pac. Rep. 889, 34 L. R. A. 350).

Counsel for appellant contend, however, that the presumption arising from the instinct of self-preservation is not to be limited to the very instant of going into danger, as to which we have seen by the cases already cited, it is expressly negatived and overcome, but that it may be presumed that deceased, on leaving the curbing, about seventeen feet from the street car track, looked in the direction from which this car was coming, and, seeing it further south than the line of wagons, which must have extended at least one hundred and fifty feet along the track, calculated that, if the car was approaching at a lawful rate of speed, he would have time to cross the track before the car would reach him, and that the question whether this calculation on his part was reasonable should have gone to the jury. There are several objections to this line of reasoning. In the first place, there is not a scintilla of evidence that deceased looked before he left the curbing and saw the approaching car so far away that it would not reach him, if moving at a lawful rate of speed, until he

might reasonably expect to have crossed the track. There is no showing whatever as to what deceased did or saw when he left the curbing. Certainly the presumption of the exercise of the instinct of self-preservation cannot constitute affirmative evidence of the existence of facts prior to and remote from the occurrence of the accident itself. It might as well be presumed, to justify deceased

in not taking precautions at the time of the collision, that he had been advised by the manager of the street car company that no cars would be run on the track on that day. If he had had such advice, he might perhaps be excused for not looking for a car, but certainly the presumption arising from the instinct of self-preservation would not constitute evidence that he had had any such advice.

The origin in this state of the rule that the presumption of action dictated by the instinct of self-preservation is due to the peculiar doctrine announced by this court in early cases that the burden of showing affirmatively freedom from contributory negligence is on the plaintiff; and it was introduced in order to avoid the evident injustice of such a doctrine in cases where there was no evidence whatever one way or the other as to the exercise of care by the injured party, and no such evidence was attainable by reason of the death of the party injured and absence of any proof as to the circumstances attending the injury. *Greenleaf v. Illinois Central R. Co.*, 29 Iowa, 14; *Way v. Illinois Central R. Co.*, 40 Iowa, 341. Where there is direct evidence as to the circumstances of the accident, the presumption is not to be entertained. See *Bell v. Incorporated Town of Clarion*, *supra*, where the cases are fully collected. It never has been held that the presumption from the instinct of self-preservation constitutes affirmative proof of any specific act, or the exercise of any specific care. The deceased in this case would not have been guilty of contributory negligence by reason of failure to

a. Instinct
of self pres-
ervation: evi-
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look when he left the curbing. All that was necessary was that he should exercise care with reference to the crossing of the street and going upon the street car track. *Terien v. St. Paul City R. Co.*, 70 Minn. 582 (78 N. W. Rep. 412); *Metz v. St. Paul City R. Co.*, (Minn.) 92 N. W. Rep. 502; *McGee v. Consolidated Str. R. Co.*, 102 Mich. 107 (60 N. W. Rep. 293, 26 L. R. A. 300, 47 Am. St. Rep. 507); *Watkins v. Union Traction Co.*, 194 Pa. 564 (45 Atl. Rep. 321); *Nugent v. Traction Co.*, 181 Pa. 160 (37 Atl. Rep. 206). Therefore it was not necessary, in order to negative contributory negligence, that plaintiff should specifically prove that deceased did look before leaving the curbing. There was direct evidence of contributory negligence at the instant of the accident, and this is not to be overcome by a pure presumption with reference to the exercise of care at some other time. As said in *Baker v. Chicago R. I. & P. R. Co.*, 95 Iowa, 163, "All that can be assumed in this case is that [deceased] was doing what he was when" he was seen; that is, to paraphrase the language of that case, stepping from the street into a place of danger before a moving car, without taking any precautions as to his safety. In further analogy to this case, we can say that, if deceased did not see or hear the approaching car, it was because he was not attentive, and in that respect was negligent; and the facts in this case, as in that, clearly overcome any presumption to arise from the rule as to instinct of self-preservation.

Counsel for appellant relies on a line of cases in which it is held that where a person about to cross a street car track is required to exercise judgment as to whether he can cross before an approaching car reaches him, the question whether he was justified, as a reasonable person, in making such attempt, is for the jury. *Patterson v. Townsend*, 91 Iowa, 725; *Callahan v. Philadelphia Traction Co.*, 184 Pa. 425 (39 Atl. Rep. 222); *McGovern v. Union Trac-*

tion Co., 192 Pa. 344 (43 Atl. Rep. 949); *Lawler v. Hartford Str. R. Co.*, 72 Conn. 74 (43 Atl. Rep. 545); *Consolidated Traction Co. v. Glynn*, 59 N. J. Law, 432 (37 Atl. Rep. 66); *Watson v. Minneapolis Str. R. Co.*, 53 Minn. 551 (55 N. W. Rep. 742). But even in cases of this character it is well settled that the person crossing the street has no right to make nice calculations and accept an imminent danger. *Terien v. St. Paul City R. Co.*, 70 Minn. 532 (73 N. W. Rep. 412); *Hickey v. St. Paul City R. Co.*, 60 Minn. 119 (61 N. W. Rep. 898); *Watson v. Mound City Str. R. Co.*, 133 Mo. 246 (34 S. W. Rep. 578). The fundamental difficulty with the whole theory of counsel for appellant in this respect is that there is no evidence that deceased looked for any car, or saw any car. This is not a case, therefore, where it appears that some care was exercised, and it is for the jury to determine whether the amount of care was such as a reasonably prudent person would exercise under the circumstances, and the case is therefore distinguished from *Hart v. Cedar Rapids & M. O. R. Co.*, 109 Iowa, 631, and *Moore v. Chicago St. Paul & K. C. R.*, 102 Iowa, 595. There was neither presumption nor evidence that the deceased exercised any care whatever for his own safety, or that he was in such a situation that it was not practicable for him to exercise care, and the trial court properly directed a verdict for the defendant.—AFFIRMED.

WEAVER, J. (dissenting).—In my judgment, the record presents a case which should have been submitted to the jury. The evidence would clearly justify a finding that the car which struck the plaintiff's intestate was being operated at a reckless rate of speed along a much traveled street, and in clear violation of a city ordinance. Assuming that the jury believed this testimony, as was their right to do, the negligence of the defendant was abundantly established. The deceased was strictly within his

legal rights in crossing the street. There was evidence tending to show that the street was straight for several blocks in either direction, and as deceased left the curb and approached the procession of covered wagons he could see the car approaching at such a distance that, if moving at a lawful or reasonable rate of speed, he could cross the track in safety before the car would reach that point. Standing in the street and viewing an approaching car from the front and at a considerable distance, an ordinary observer cannot easily determine whether its speed is excessive. Deceased had the right to assume that this car was being operated with reasonable care, and within the lawful maximum of speed, and he was, therefore, justified in assuming that he might with safety cross the track behind the wagon without danger of being run down and killed by that particular car. At least, it was a fair question for the jury whether, as a reasonably prudent person, he could rely upon the appearance of safety, and make the attempt. It is said, however, that no witness saw him from the time he left the curb until he emerged from behind the wagon, and that, therefore, it cannot be presumed he looked or took any precaution for his safety. This proposition is sought to be sustained by the argument that living witnesses of the accident having been produced, we cannot entertain any "presumption that, prompted by the instinct of self-preservation, deceased was taking precautions for his own safety." This seems to me an extreme and unwarranted application of the rule laid down in *Bell v. Incorporated Town of Clarion*, 118 Iowa, 126. In the first place, there are no living witnesses of the accident in the proper sense of that term. There are witnesses who had an instantaneous glimpse of the collision, but of nothing more; and none of them details facts or circumstances which we can say as a matter of law charge the deceased with contributory negligence. The sight of a car and a man in collision on a railway crossing,

and no more, affords not the slightest ground for the court to arbitrarily determine the question of negligence or contributory negligence. Those matters are not to be found from the mere fact of collision alone, but also from the facts and circumstances immediately preceding and leading up to it, and, if living witnesses of these vital circumstances are not available, we may then indulge in all proper presumptions and inferences concerning them.

No case has been decided by us, not excepting *Bell v. Incorporated Town of Clarion*, which goes farther than to say that, as to any particular material act or fact of which living witnesses are able to testify, no presumption of due care will be indulged. It has never been, and I trust never may be, held that where the question of contributory negligence depends, or may depend, upon a series of facts or circumstances, the production of living witnesses as to one has the effect to exclude all presumption or inference of due care as to others of which no witnesses can be found. Indeed, as I read the authorities, the contrary rule is well established. In *Whitsett v. R. R.*, 67 Iowa, 158, in discussing this question, we said: "But when the facts of the transaction are proven by direct testimony the question whether the party acted negligently or with care is to be determined from those facts." In *Reynolds v. City of Keokuk*, 72 Iowa, 372, we referred to our prior decisions in this class of cases, and in explanation said: "In these last cases the injured person was dead; and what caused his death, or the facts tending to show contributory negligence on his part, or the reverse, did not clearly and certainly appear; and therefore the instinct of self-preservation was held to be a circumstance which the jury was entitled to consider. But where the injured person is living, and does or can testify to the facts and circumstances and in what manner the injury was received, then there is no reason why the inference arising from the instinct of self-preservation

should be indulged." In *Hopkinson v. Knapp*, 92 Iowa, 328, we said: "It is true there is no affirmative evidence of due care on the part of the decedent to avoid the accident and to enable plaintiff to recover it must be shown that decedent was free from negligence. Direct and positive evidence that decedent did not, by his own negligence, contribute to the injury, is not required. Where such evidence cannot be obtained, it is proper for the jury to consider the instincts of men which naturally lead them to avoid danger as evidence of due care on the part of the person injured." In *Baker v. R. R.*, 95 Iowa, 171, we again explained that it was our purpose to apply the rule to cases where the conduct of the person injured "is traced so closely to the accident that from it, aided by the presumption that arises from a natural disposition to avoid injury, the fact of diligence could well be found." In *Dunlavy v. R. R.*, 66 Iowa, 435, we denied the benefit of the presumption because the party having the burden of proving care could "show by direct evidence what care was exercised" by him. In the *Bell Case*, we once more said that, "where there is direct evidence as to whether or not the injured party was negligent, then the inference is entitled to but little, if any, weight." In that case the husband of the deceased woman was a witness on the trial, and showed that he was in her immediate company at the time of her injury, though not seeing the movement of the plank which caused the accident; yet we held the "inference," as distinguished from a "presumption" of care, to be drawn from the natural instinct of self-preservation, was to be considered by the jury. Whether the shadowy border land between an "inference" and a "presumption" is one which either court or jury may profitably explore we need not consider, for it is enough to say that, so long as the testimony affords room for even a legitimate "inference" of due care, the court is going beyond its province in directing a verdict.

The case at bar fills every definition of the rule laid down in the *Bell*, *Reynolds*, *Whitsett*, *Hopkinson*, and *Baker Cases*. "The facts of the transaction," "the facts tending to show contributory negligence or the reverse," are not shown by living witnesses, and by reason of the death of the injured party it is not possible for his administrator to "show by direct evidence what care was exercised by him." That this is a proper case to apply the presumption from the natural instinct of self-preservation is upheld by the principle announced in every decision I have been able to find in which such presumption is recognized as admissible under any circumstances. It is perfectly obvious that whether deceased was exercising reasonable care when he stepped from behind the moving wagon to the railroad track depends largely, if not entirely, upon the precaution exercised by him in going from the curb to the wagon. Of that fact no living witness can speak, and the presumption or inference we have been considering speaks for the dead. It is inconceivable how, in the light of this record, we can say there is such direct and positive evidence of the contributory negligence of the deceased as to exclude the question from the jury. Not a single witness saw him for a sufficient space of time, or at such a distance from the point of collision, as to see or know whether his conduct was marked with recklessness or with due care. The space between the wagon and the car was so narrow that the motorman testified that he could have touched the other vehicle with his hand as he flew past. One witness says that there was "no perceptible time" between the appearance of Ames behind the wagon and the collision with the car. The motorman did not see him at all until he was struck. Another witness says, "No length of time elapsed between when I saw the man and he was struck. It was a flash—instantaneous." Yet we are told that, because two or three witnesses caught this flash-like view of the impact between the unfortunate

man and the moving car, knowing nothing of his method of approach or of his care to assure himself of the absence of danger before approaching the screen created by the wagons, there can be neither presumption nor inference that in making his approach he acted according to the instincts which impel a normal man to avoid death or enormous bodily harm. The statement of the proposition is its own refutation. Why is the presumption ever indulged? Simply, under the rule of our decisions, to supply the best obtainable evidence of a material fact concerning which no living witness is found to testify. If, for instance, due care required the deceased to stop, look, or listen before venturing to cross the track, and direct evidence of his conduct in that respect is not obtainable, then from the natural instinct of self-preservation which influences normal human action in a place of known danger the jury may find that he did in fact exercise such care. We have repeatedly held, even as applied to an ordinary railway, that the court cannot say, as a matter of law, at what particular point or limit in the approach to a crossing this duty to stop, look, or listen must be attended to; or whether, having looked or listened at one point within a reasonable distance, he is bound to look again before stepping upon the track. *Winey v. R. R. Co.* 92 Iowa, 622; *Mackerall v. R. R. Co.*, 111 Iowa, 547; *Moore v. R. R. Co.*, 102 Iowa, 595; *Cummings v. R. R. Co.*, 114 Iowa, 86.

How can it be said, then, because in the instant between the discovery of the decedent at the rear of the wagon and the collision, he was not seen to pause and look for the car, we must deny him the presumption of reasonable care to that point? We are told by the majority opinion "there was direct evidence of contributory negligence at the instant of the accident," and "therefore it is immaterial what care he may have exercised prior to that moment." This, it seems to me, is a begging of the entire

question—an assumption of the very fact in issue. How are we able to say that deceased was at that moment doing a negligent act when the question of its negligence depends or may depend upon what preceded it? The citation of the *Baker Case* in support of this assumption is not in point. In that case the deceased was last seen walking along (not across) the track of a railroad (not street railroad), and was, therefore, a trespasser, a wrongdoer, voluntarily putting himself in a place where the railroad company was under no duty to be on the lookout for him. There being no duty to exercise care for the safety of one on the track without authority, and there being no evidence that the deceased was seen by the trainmen in time to avoid the injury, there was an entire failure to prove any negligence on the part of the company, and such being the case, it was very properly held that the ordinary presumption as to the instinct of self-preservation could not prevail over this evidence of his contributory negligence. No further statement is needed to show the inapplicability of that precedent. We are also told “it has never been held that the presumption from the instinct of self-preservation constitutes affirmative proof of any specific act or the exercise of any specific care,” and that such presumption “cannot constitute affirmative evidence of facts prior to and remote from the occurrence of the accident itself.” Conceding the correctness of this statement as to “remote” occurrences, it can be readily shown that the proposition is in other respects clearly out of harmony with our own decisions and the decisions of other courts recognizing the presumption above mentioned.

In *Dalton v. R. R.*, 104 Iowa, 26, deceased met his death upon a public crossing by collision with a train running at a negligently high rate of speed. The accident occurred at night, and, according to the statement in the opinion, “no one witnessed the accident, nor the manner in which the deceased approached and went upon the

crossing." It was further said: "It cannot be questioned that in going upon that crossing when he did the exercise of ordinary care required that deceased should have stopped and looked and listened to know if a train was approaching. It is a recognized rule of human conduct that persons in their sober senses naturally and instinctively seek to avoid danger. Therefore it must be presumed, till the contrary appears, that the deceased, prompted by this natural instinct, did exercise care in approaching and going upon that crossing." And upon this presumption alone we held the trial court to have erred in directing a verdict for the defendant. In other words, it was there held that the presumption from natural instinct did afford affirmative, substantive evidence that deceased did do the specific thing which we said he was clearly bound to do—"stop and look and listen." Such, also, is the principle to be deduced from *Hopkinson v. Knapp*, 92 Iowa, 328, and, indeed, from all of that line of cases. Due care ordinarily implies a certain line of conduct, specific acts of watchfulness or caution, and the presumption that a deceased person was not guilty of contributory negligence is neither more nor less than a presumption that he did do the specific act or thing which reasonable prudence dictated under the circumstances. It has also been expressly held in other jurisdictions that, where a person has been killed upon a railroad crossing, and there is no direct evidence of the circumstances of the accident, the law will presume the deceased to have stopped, looked, and listened. *Mynning v. R. R.*, 64 Mich. 93 (81 N. W. Rep. 147, 8 Am. St. Rep. 804); *McBride v. R. R.*, 19 Or. 64 (23 Pac. Rep. 814).

In *Hendrickson v. R. R.*, 49 Minn. 245 (51 N. W. Rep. 1044, 16 L. R. A. 261, 82 Am. St. Rep. 540), there was direct evidence that the deceased was seen to drive down to and upon the right of way, and was discovered by the

engineer an instant before the collision; but there was no evidence whether he looked or listened—circumstances in all essential respects parallel with those of the case at bar. The court there held: "A plaintiff administrator is not required in all cases of this character to prove affirmatively that his intestate looked or listened. It may be inferred, in view of the circumstances, that the deceased, governed by the instinct of self-preservation, did what a prudent man ordinarily would do to save his life." The Pennsylvania court, which applies the rule of "stop, look, and listen" with the utmost rigor as an unbending rule of law, has also announced the same doctrine. *Penn R. R. v. Weber*, 76 Pa. 157 (18 Am. Rep. 407); *Schum v. R. R.*, 107 Pa. 12 (52 Am. Rep. 468). In *Lyman v. R. R.*, 66 N. H. 200 (20 Atl. Rep. 976, 11 L. R. A. 864), the New Hampshire court, discussing a crossing accident, says: "It is true it does not definitely appear that the deceased used any precautions to avoid the collision, but it is a presumption of common sense as well as of the common law that persons of mature years and in possession of their senses are ordinarily prudent, and will exercise ordinary diligence to avoid danger." In *Philipps v. R. R.*, 77 Wis. 349 (46 N. W. Rep. 543, 9 L. R. A. 521), a pedestrian in the act of crossing a track was struck and killed by a moving train, but the details of the accident were not made clear by the evidence. To an objection raised by the railway company that nothing was shown as to how the deceased came to the place of collision, the court replies: "If the manner of his coming there was not shown, then no negligence of the deceased could be predicated upon it." And to the objection based on the absence of any showing that deceased looked or listened, it was further said, after reviewing the circumstances: "These facts may well modify the rule that it was the duty of the deceased to look just at the time the cars were near him. It may be he had looked in that direction, but when the detached

cars had not yet started on the side track. He is not here to be questioned as to what he did or did not do, and his conduct is entitled to all reasonable probabilities. One thing is certain: he did not know these cars were creeping towards and so near him when he undertook to cross the track."

An intestate was found fatally injured in a pit negligently left unguarded. He was acquainted with the pit, and knew of its unguarded condition. There was no witness of the accident. The trial court having nonsuited the administrator because of his failure to show want of contributory negligence on part of the deceased, the judgment was reversed. The court says: "The person injured did not live to tell his story. We think the case should have been submitted to the jury. There is ordinarily a certain degree of presumption that a person of ordinary intelligence will not purposely expose himself to danger." *Cassidy v. Angell*, 12 R. L. 447 (84 Am. Rep. 690).

Discussing the same proposition, the New York court says: "The *onus probandi* in this, as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts. Thus, if a carriage be driven furiously upon a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover though there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of defendant's conduct would create so strong a probability that the injury happened through his fault that no other evidence would be required." *Johnson v. R. R.*, 20 N. Y. 65 (75 Am. Dec. 375). In the absence of direct proof, the jury are at liberty to infer ordinary care from the circumstances of the case. To hold otherwise would be to presume negligence on the part of one in excuse of proved or

admitted negligence on the part of another. *Louisville R. R. v. Goetz's Adm'r.*, 79 Ky. 442 (42 Am. Rep. 227); *Gay v. Winter*, 84 Cal. 164. See, also, *Chesapeake & O. Ry. Co. v. Steele's Adm'r.*, 29 O. C. A. 81 (84 Fed. Rep. 93, 54 U. S. App. 561); *Kimball v. Friend's Adm'r.*, 95 Va. 139 (27 S. E. Rep. 901); *Southern R. R. v. Bryant's Adm'r.*, 95 Va. 221 (28 S. E. Rep. 188); *Northern R. R. v. State*, 81 Md. 357 (100 Am. Dec. 69); *Chicago R. R. v. Carey*, 115 Ill. 115 (8 N. E. Rep. 519).

It is to be conceded that decisions may be found which seem to deny the existence of the presumption in any case, but the doctrine of its existence is upheld by the great weight of authority. In no other case have we found it restricted to such narrow limits as are drawn in the majority opinion.

But, aside from this presumption and the question of its extent, the case is still one for the jury. The deceased was not a trespasser. He had an undoubted legal right to cross the street—a right which the appellee was bound to respect by operating its cars at reasonable speed, and with due care for his safety. It necessarily follows that deceased was not so strictly bound by the rule of "stop, look, and listen" as would be the case in crossing the right of way of an ordinary railroad. *Orr v. R. R.*, 94 Iowa, 426; *Beem v. R. R.*, 104 Iowa, 565; *Walker v. R. R.*, 81 Minn. 404 (84 N. W. Rep. 222, 51 L. R. A. 632); *Newark etc., Ry. Co. v. Block*, 55 N. J. Law 605 (27 Atl. Rep. 1067, 22 L. R. A. 374). He had the right to proceed upon the theory that the railroad company would do its duty. He was not required to anticipate its culpable negligence. *Smith v. Union Trunk Line*, 18 Wash. 351 (51 Pac. Rep. 400, 45 L. R. A. 169); *Cincinnati R. R. v. Snell*, 54 Ohio St. 197 (43 N. E. Rep. 207, 32 L. R. A. 276). As suggested in the opinion in the New York case above cited, the man who drives his horse furiously down a crowded city street to the imminent peril of other travelers is not to be allowed

to escape from the consequences of his wrongful act by saying to one whom he has thus injured, "You ought to have been looking out for me, and thus have avoided injury." The street railway company which shoots its car like a flying cannon ball along a public way with equal disregard of the safety of others and its duty to obey the law occupies not a whit better position than the reckless driver of a private conveyance. In neither instance is the peaceable traveler required to anticipate the negligence or wrong of another, nor is he chargeable with contributory negligence if, by acting upon the presumption that all vehicles will be managed with reasonable care, he receives an injury. The natural and usual thing for a pedestrian of ordinary experience and care, as he turns from the curb or sidewalk to cross a street in which a railway operates, is to look for approaching cars. If, in this instance, the deceased did look, he saw the car at a presumably safe distance to permit the crossing. If he did not look, he lost sight of nothing which we can say as a matter of law should have warned him of danger from that source. The only theory upon which a failure to look or listen is held to be negligence is that by looking or listening the traveler would have discovered something giving him notice of the peril in time to avoid it.

Says the Ohio court: "Ancient rights have not changed because new vehicles have been introduced upon the streets, nor because a portion of the people who ride, being in haste to reach their destination, demand rapid transit. The streets remain for all the people, and he who goes afoot has the right, especially at a crossing, to walk to his destination. He should not be compelled to run or to dodge and scramble to avoid collision with vehicles. As a general proposition, drivers of vehicles have the same right to travel along the carriageway that foot passengers have to walk there. There is no priority of right. So that the right of neither is exclusive.

* * * Life and limb are of more consequence than quick transit. The vehicle man must not run down the pedestrian. The opposite doctrine seems to have found lodgment in many minds, and there seems to be a disposition to assume that a foot passenger has no right upon a public street against a street car. Indeed, common observation seems to show that this belief controls the conduct of drivers of many conveyances, public and private. Too often there is a reckless disregard of human life and limb, and pedestrians are compelled at their peril to keep out of the way. * * * We suppose the rule for street cars is the same as for other vehicles, and if the footman is required in a crowded thoroughfare to look up and down and wait until all possibility of collision is past it would be like sitting on the bank until the stream should run by." *Cincinnati R. R. v. Snell, supra.*

In the case from which the foregoing quotation is made the plaintiff, leaving a car on one track, stepped across a three-foot space upon another track, and was run down. It was sought to avoid liability by urging that the plaintiff could have avoided injury by looking, and therefore could not recover; but the court says: "Whether looking eastward would have disclosed the coming car depends upon whether the receding car would have obstructed the view, and this depends upon its location at the time Snell looked, if he did look. The evidence is consistent with the conclusion that he looked up the track, but that the receding car prevented him from seeing the approaching one, and that, as the former made some noise, his attention was not called to the rumbling of the latter. And it is not inconsistent with the conclusion that ordinary range of vision would probably have enabled him, without turning his head or eyes up the track, to see the car in time to avoid it, had the car been running at a safe rate of speed; and we think one crossing could not be asked to extend his observation beyond that distance

within which a car proceeding at a customary and reasonably safe rate of speed would threaten his safety. Taking the effect of the evidence as a whole, one thing which is tolerably clear is that, if the car had been running at a reasonable rate of speed, and proper warning had been given, Snell would not have been injured. All else is more or less in doubt. The evidence pro and con was to be weighed, and the tribunal for that purpose was the jury, not the court upon the motion." All of these observations apply with great force to the case before us. "Failure to look and listen before crossing the track of an electric railway in a public street where cars have not the exclusive right of way is not negligence as a matter of law." *Roberts v. R. R.*, 28 Wash. 325 (63 Pac. Rep. 506, 54 L. R. A. 189); *Chicago R. R. v. Robinson*, 127 Ill. 9 (18 N. E. Rep. 772, 4 L. R. A. 126, 11 Am. St. Rep. 87); *Garrity v. R. R.*, 112 Mich. 369 (70 N. W. Rep. 1018, 37 L. R. A. 529); *Newark R. R. v. Block*, 55 N. J. Law, 405 (27 Atl. Rep. 1067, 22 L. R. A. 374).

In the last cited case it is said of the foot passenger's duty to look out for approaching cars: "But the request before us brings into question the extent to which one crossing the roadway on foot must extend his observation. Its claim is that such observation must be extended to any approaching car, no matter how distant. But this is obviously an exaggerated notion of the duty required. The most prudent man would never suppose himself required to thus observe. * * * Prudence doubtless requires any one about to cross a railroad track to use his eyes to observe any approaching car within his vision; but, as has been shown, prudence does not require one crossing the track of a street railway to extend his observation to the whole line of track within his vision, but only to such distance as, assuming the required care in their management, approaching cars would imperil his crossing." Dunbar, J. in *Smith v. Union Trunk Line*, *supra*, says: "Of course, the

pedestrian must use ordinary care to avoid collision, and the care must be proportioned to the danger to be avoided. But the laws must look at human minds just as they exist, with all their frailties, their inclination to abstract thought, and absent-mindedness." See, also, *Tesch v. R. R.*, 108 Wis. 593 (84 N. W. Rep. 823, 53 L. R. A. 618); *Consolidated Co. v. Scott*, 58 N. J. Law, 682 (84 Atl. Rep. 1094, 38 L. R. A. 122, 55 Am. St. Rep. 620).

Whether an injured party could have avoided the injury by moving from the track more quickly, is for the jury to determine. *Hicks v. R. R.*, 124 Mo. 115 (27 S. W. Rep. 542, 25 L. R. A. 508). Whether one who has looked or listened for moving cars at a crossing should have renewed his observations at a point nearer the track, is for the jury. *Newhard v. R. R.*, 153 Pa. 417 (26 Atl. Rep. 105, 19 L. R. A. 563). In the *Walker Case*, *supra*, the Minnesota court says of the act of the plaintiff in stepping upon the track where she was injured: "If she then knew that the car was running at forty miles an hour, and was disregarding her signals to stop, it might be said as a matter of law that she was negligent in going forward; but we cannot, without weighing diverse speculations and usurping the functions of the jury, decide upon the effect of the headlight upon her vision, or the reasonableness of her necessarily instantaneous views at the time. It may have been extremely difficult to discriminate between the effects of the headlight and decide upon its probable distance from her, or to calculate upon the speed of the car; and it must not be forgotten, either, that the judgment of the plaintiff in these respects may have been influenced by the reasonable supposition that the car was running at its proper speed, and would stop upon the signals given for her benefit." If the injured party was guilty of no culpable negligence, the mere fact that he might have avoided the injury by greater diligence will not defeat his recovery of damages. *Fero v. R. R.*, 22 N. Y. 213 (78 Am. Dec.

178); *Besiegel v. R. R.*, 34 N. Y. 622 (90 Am. Dec. 741); *Brown v. R. R.*, 32 N. Y. 597 (88 Am. Dec. 353). "The fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the jury and pronounced upon as a matter of law." *Ireland v. R. R.*, 13 N. Y. 533. "It is not true that a traveler is guilty of culpable negligence as a matter of law if he does not stop to listen or look up and down the track before he goes over a crossing. * * * Whether such an omission is culpable depends upon the facts and circumstances of each particular case." *Ernst v. R. R.*, 35 N. Y. 9 (90 Am. Dec. 761).

A traveler driving across a street railway looked in one direction, but did not look in the other, from which a car was approaching, until the heads of his horses were over the near rail, and he was unable to advance or retreat in time to avoid the collision. Upon this state of facts the Minnesota court, after a careful review of the law, held the question of contributory negligence could not be disposed of as a matter of law. *Shea v. R. R.*, 50 Minn. 395 (52 N. W. Rep. 902.) A similar proposition is affirmed in *Guggenheim v. R. R.*, 66 Mich. 150 (33 N. W. Rep. 161). In Massachusetts, where it has been said (*Ernst v. R. R.*) *supra* "no undue rigor of intendment is supposed to prevail on this subject," the same principle is well established, even as to the ordinary railroads. The view of a railway was somewhat obscured to one approaching the crossing, but at a point thirty feet from the rails the track could be seen for the distance of a half a mile. A woman drove to the crossing as a freight train was going by, and, waiting until she supposed the last car to have passed, drove on, without looking up the track, and was run down by cars which had been purposely detached from the freight train, and were following it of their own momentum. Had she looked at any point within the thirty feet, she could have seen the approaching cars, and avoided

injury; and she gave as her only excuse for not doing so that she did not suppose that one train would follow another so closely. It was held that the company was not entitled to a peremptory instruction that plaintiff was guilty of contributory negligence, and that the question must be left to the jury. *French v. R. R.*, 116 Mass. 537. It is there said that, where the facts of a crossing accident are undisputed, it still remains, except in extraordinary cases, a question for the jury whether there is contributory negligence. *Robbins v. R. R.*, 165 Mass. 30 (42 N. E. Rep. 334); *Benjamin v. R. R.*, 160 Mass. 3 (35 N. E. Rep. 95, 39 Am. St. Rep. 446); *Chaffee v. R. R.*, 104 Mass. 115; *Gaynor v. R. R.*, 100 Mass. 208 (97 Am. Dec. 96). In the *Chaffee Case* it is said that a failure to look for a train at the moment of crossing is not negligence as a matter of law—a holding which is directly contrary to the position of the majority in this case. In New Jersey the reasonable rule is announced that, where a traveler and a street car are approaching a common point of crossing, if the car is at such a distance that the traveler using reasonable care, may first cross, he has the right of way. *N. J. E. R. Co. v. Miller*, 59 N. J. Err. & App. 423 (36 Atl. Rep. 885). This case is affirmed in principle, though not upon parallel facts, by our own case of *Correll v. R. R.*, 38 Iowa, 120, where a herd of cattle being driven over a crossing were injured by a passing train moving through a town at an unlawfully high rate of speed. To the claim that there was contributory negligence on the part of the party in charge of the cattle, we said: "This was primarily a question for the jury. * * * It seems reasonably probable that, if defendant's train was moving at a lawful rate of speed, the person in charge of the stock would have been able, by the efforts made by him, to prevent the injury; and that his conduct would have been consistent with due care on the hypothesis that he supposed the train to be moving at a lawful rate of speed. This he had a right to assume

until the contrary appeared. Whether he was advised of the true speed of the train in time to act differently from what he did is doubtful, to say the least." We also said in *Artz v. R. R.*, 34 Iowa, 158: "If the view of the railroad, as the crossing is approached on the highway, is obstructed by any means so as to render it impossible or difficult to learn of the approach of a train, or there are complicating circumstances calculated to deceive or throw a person off his guard, then whether it was negligence on the part of the plaintiff or person injured, under the particular circumstances, is a question of fact, and not of law." *Moore v. R. R.*, 102 Iowa, 597. In the cited case plaintiff looked at a distance of sixty feet from the track, but did not look again. At a distance of forty feet, had he looked, he must surely have seen the approach of the engine which injured him; but even under such circumstances we held it error to direct a verdict for the defendant. Indeed, it has often and very justly been held that, where the negligent conduct of a defendant is of such gross character as to indicate a wanton or reckless disregard of injury resulting to others, contributory negligence of the plaintiff will not relieve the wrongdoer from liability for damages. See Cooley on Torts (2d Ed.) 810; Beach on Contributory Negligence (2d Ed.) sections 61-64; *Brannen v. R. R.*, 115 Ind. Sup. 115 (17 N. E. Rep. 202, 7 Am. St. Rep. 411) *Florida Southern Ry. v. Hirst*, 30 Fla. 1 (11 South. Rep. 506, 16 L. R. A. 681, 32 Am. St. Rep. 33); and cases thereunder cited. This principle has been applied to the act of a railway company running its trains at a prohibited rate of speed through a city. *L. S. & M. S. R. R. Co. v. Bodemer*, 139 Ill. 596 (29 N. E. Rep. 692, 32 Am. St. Rep. 218).

If such is the law as applied to travelers crossing a railroad, and if, as must be conceded, the rule is still less stringent as applied to street railways, there seems no possible escape from the conclusion that the district court

erred in directing a verdict. The courts should exercise scrupulous care not to invade the province of the jury. While the right to direct or set aside the verdict under appropriate circumstances is one which cannot be safely surrendered, the occasions for its proper exercise are very few. It is by no means a settled proposition that the united judgment of twelve average jurors upon a question of fact unmixed with law is any less apt to be right than that of a court, however learned or eminent. This is peculiarly true in respect to questions of reasonable care. Whether a person has exercised reasonable care under any given state of circumstances is not a question requiring expert knowledge or high scientific or legal attainments. It is a question which the average juror coming in daily contact with the men and circumstances of ordinary every day life can far better understand and solve than can one who lives in the realm of books and breathes the atmosphere of pure theory. Whether an act is that of a reasonably prudent man is not to be found by going to the decisions or text writers, but by consulting the habits and conduct of average men. The question, as has been said in *Ernst v. R. R. supra*, is, "What would a majority of men of common intelligence have done under like circumstances?" And who so competent to answer this question as a jury made up of such men? Says the New York court in the case last cited: "Even among the cases which have been held so plain as to justify a nonsuit, there have been few in which the judges have not themselves disagreed, and the inquiry naturally occurs to the mind whether we are less liable than jurors to err on questions of pure fact pertaining to the ordinary affairs of life. Our law is framed upon the theory that upon such questions the citizen can rely with more security upon the concurrence of twelve jurors than on the majority vote of a divided bench. * * * But we have had occasion recently to hear nonsuits of this kind justified on the novel ground

that, unless the fact be determined one way by the judge, it will be sure to be determined the other by the jury. The correctness of judicial opinions on mere questions of fact may well be distrusted when we find them confessedly opposed to the common sense of mankind." Expressing the same thought, the Massachusetts court, in the *Gaynor Case*, remarks, "It is the judgment and experience of the jury, and not of the judge, which is to be appealed to." See, also, discussions by Chief Justice Cooley in *Detroit, etc., R. R. v. Van Steinburg*, 17 Mich. 120.

Tried by the standard of principle as well as by the precedents, the plaintiff should have been allowed to go to the jury. In my opinion, therefore, the judgment below should be REVERSED.

DEEMER, J., concurs in the foregoing dissent.

A. J. COLE, Appellant, v. JOHN JOHNSON, Appellee.

120	667
136	174

Landlord and Tenant: FORFEITURE OF LEASE: DEMAND FOR RENT.

Where a lease contains a forfeiture clause in case the tenant fails to pay any installment of rent when due, the forfeiture cannot be enforced and an action of forcible entry and detainer maintained until demand has been made for payment of amount due, and a reasonable time given in which to pay the same.

Appeal from Hancock District Court.—HON. J. F. CLYDE,
Judge.

MONDAY, MAY 25, 1903.

OMITTING matters not material to the questions argued in this court, this case may be stated as follows: Plaintiff, by a written instrument, leased a farm of two hundred acres in Winnebago county, Iowa, to the defendant, for a term of three years beginning March 1, 1899. By the terms of the contract the lessee undertook to pay grain rent for the cultivated lands, cash rent of \$1.50 per acre

for the hay and pasture lands, and work out the highway taxes. The lease also contains a provision as follows: "A failure to pay the rent as agreed upon, or to comply with any of the stipulations of this lease by the said party of the second part, shall authorize the said party of the first part to consider the lease forfeited, and he may take possession of the premises without notice, and without process of law, or he may bring an action as allowed by law to recover possession." On the 12th of December, 1900, the plaintiff served a written notice upon the defendant to surrender the lease and quit the premises within three days, said notice reciting that plaintiff terminated said lease and claimed immediate possession of the lands on account of defendant's failure to pay the cash rent due December 1, 1900, failure to pay or work the road taxes for the years 1899 and 1900, and failure to properly cultivate said lands or care for the crop raised thereon. Defendant having refused to comply with the notice, plaintiff, on December 29, 1900, began this action—a proceeding in forcible entry and detainer—before a justice of the peace. The defendant appeared, and, denying the petition, further answered that plaintiff had waived the condition of the contract relating to the cash rent, and had voluntarily consented to an extension of time thereon. He further alleged that the number of acres of land subject to cash rent has never been determined, that the rent was payable at no particular place, and that no demand therefor had ever been made upon him. Upon the trial before the justice of the peace there was a judgment for plaintiff, from which judgment defendant appealed to the district court. The cause was tried in the latter court February 26, 1901, and at the close of the testimony the court sustained the defendant's motion to direct a verdict in his favor. There was a verdict and judgment accordingly, and an order for writ restoring defendant to the possession of the farm, and plaintiff appeals.—*Affirmed.*

Bradford & Aldridge for appellant.

John Hammill for appellee.

WEAVER, J.—It is true that under the terms of the lease a failure of the tenant to pay any installment of rent when due “authorized the lessor to consider the lease forfeited”; in other words, he had the election to waive strict performance, and permit the tenant to go on to the end of the term, or to insist upon strict performance, and take proper steps to make the forfeiture effective. It is the claim of plaintiff that he elected to pursue the latter course, and it is conceded, as we have seen, that, soon after the date when the rent for the hay and pasture land became due, he served notice upon defendant to surrender possession of the farm. There is, however, no allegation or testimony to the effect that any demand for the payment of said installment was ever made, and we are thus brought to consider the principal question presented in argument: Is a demand of the rent an essential condition to the enforcement of the forfeiture and the maintenance of forcible entry and detainer? The rule was very strict at common law, and is still observed in most states where no statutory modification has been made, that, to forfeit a lease for nonpayment of rent, demand must be made on the leased premises at or near sundown on the day when such payment falls due. See the numerous authorities cited in 18 Am. & Eng. Ency of Law (2d Ed.) 375. Without attempting now to determine just how far this rule may be abrogated by our statute, we are of the opinion that a demand should be made, and some reasonable opportunity to make payment afforded the tenant, before employing a summary remedy for his ejection. It is a familiar principle that forfeitures are not favored in law, and their effect will be limited by strict construction of statutes and contracts. There is no hardship in this re-

quirement, and there may be great hardship in enforcing a technical forfeiture, which a simple demand might have rendered unnecessary. The rule is salutary and humane, and accords with the general policy of the law. The circumstances of the present case furnish an apt illustration of the propriety and justice of this conclusion. The lease does not specify the number of acres of hay or pasture land, and hence does not in itself furnish the necessary data for ascertaining how much rent was due. The plaintiff himself did not learn the exact amount until after the trial of this case in justice's court. To determine that amount required either a mutual agreement as to the amount of land or a measurement of its area. It has frequently been held that upon a contract where the extent of the promisor's obligation is uncertain, or is not precisely known, but requires some further act of the parties to make the same definite and certain, an action will not be sustained without demand. *Chamberlain v. McAllister*, 36 Ky. 352; *Lent v. Padelford*, 10 Mass. 230 (6 Am. Dec. 119); *Bush v. Critchfield*, 4 Ohio. 103.

The order of the district court in directing a verdict for the defendant was right, and the judgment appealed from is **AFFIRMED**.

W. A. CAMPBELL, Appellant, v. MARY E. SPEARS AND E. D. SPEARS.

Exchange of Properties: TAXATION: SALE OF LAND: TITLE. A

- 1 sale of public land for taxes assessed prior to the issuance of patent conveys no title to the purchaser.

Fraud: CONVEYANCE OF LAND: EVIDENCE. In an action to rescind

- 2 a contract for the exchange of lands, the evidence is held to show that defendant's statements that the title was good were false, made with intent to deceive and were relied upon by plaintiff.

Fraud: LACHES: EVIDENCE. In an action to rescind a contract
8 for the exchange of lands on the ground of fraud, the evidence is considered and it is held under all circumstances that plaintiff was not guilty of laches in bringing his action and that the same was not barred.

Possession: DISTURBANCE OF. In an action to set aside a deed on
4 the ground of fraud and failure of title, where it appears that plaintiff never took actual possession, the fact that his possession was never disturbed is no defense.

Misjoinder. Misjoinder of causes of action not taken advantage of
5 by motion to strike is waived.

Accounting. In an action to set aside an exchange of properties
6 on the ground of fraud, where a rescission is decreed, an accounting of improvements, rents, profits and expenses may be had and such judgment rendered in favor of the party entitled thereto as will place them in *statu quo*.

Appeal from Wright District Court.—HON. S. M. WEAVER,
Judge.

MONDAY, MAY 25, 1908. .

SURT to rescind a contract under which the parties exchanged properties. Upon hearing, the petition was dismissed, and plaintiff appeals.—*Reversed*.

Nagle & Nagle for appellant.

B. P. Birdsall and *S. Flynn* for appellees.

LADD, J.—On April 2, 1895, the plaintiff traded an acre of land, on which was a residence and barn, and a cow, three pigs, and twelve chickens, to E. D. Spears, for a quarter section of land in South Dakota. Plaintiff's realty was incumbered for \$700, and worth about \$1,500, and the land had a value of \$800. The residence property was conveyed to Mary E. Spears, who deeded the land to plaintiff. The record puts it beyond question that she had
1. **TAXATION:** no title to the land, and for this reason none
sale of land: passed under her deed to plaintiff. An ab-
title.

abstract brought down to February, 1893, was exhibited to plaintiff, from which it appeared that one Schatunovsky entered the land and obtained final pre-emption receipt in 1883; that he conveyed it by warranty deed to McDonald June 4, 1884,—“except taxes for 1883 amounting to \$15.44 and a contest before United States land office, Mitchell, S. D., which said Moses Schatunovsky does not warrant against”; that patent issued to George A. Rogers June 25, 1890; that the county treasurer executed a tax deed to M. H. Rowley in 1888, and another in 1892; that Rowley conveyed the land to defendant E. D. Spears in 1892; that in February, 1893, he transferred it to Caffrey. The evidence shows that the entry of Schatunovsky was canceled by the Land Department in 1886, and that the tax deeds were based on assessments and levies made in the years 1884 and 1887, long before title passed from the United States under the patent to George A. Rogers. As the lands were not then taxable, the deeds were void (*Reynolds v. Plymouth Co.*, 55 Iowa, 90; *Moriarty v. Boone Co.*, 39 Iowa, 634; *Duncan v. Newcomer*, 9 S. D. 375 (69 N. W. Rep. 580); *Pitts v. Clay*, (C. C.) 27 Fed. Rep. 635. And the deed of Caffrey to Mary E. Spears, and of her to plaintiff, passed no title.

II. The evidence has convinced us that E. D. Spears induced Campbell to take the land by knowingly misrepresenting the title. Campbell appears to have been unlearned and not much accustomed to business transactions. The abstract, to his comprehension, was Greek. He relied on Spears' assertion that the title was good. His testimony that such representation was made is confirmed by Donly, a witness called by defendants. Spears admits saying he believed the title good, but insists that he added that he was no abstract reader, and would let him (Campbell) have the title as he got it. As he caused his wife to execute a warranty deed to Campbell, assuring the title as plaintiff

2. FRAUD: conveyance of land: evidence.

claims he represented, we are inclined to accept Campbell's account of the transaction. They agreed to submit the abstract to Donly, and, upon doing so, were advised by him that, though not pretending to be an authority on abstracts, he believed it was defective because of the patent to Rogers. In the face of this, Spears stoutly asserted the title was good, and afterwards saw Donly privately and chided him for what he had said, as it might break up the trade, and requested him to remain quiet—let the exchange be made—and he would make it “all right with him.” Though the proposition was not accepted, Campbell did not return. As the abstract did not disclose title in either of defendants, and Donly indicated a fatal defect in that of Caffrey, on what did Campbell rely, if not on Spears' representations? The bare suggestion, without support in the record, of defendant's financial responsibility to comply with the covenants of the deed, does not answer this inquiry. Spears represented the title good, and Campbell was foolish enough to accept his word as against Donly and anything he may have been able to read in the pretended abstract. That Spears knew his statements were false needs no other proof than his attempt to suppress information by Donly, with a price on his silence. See *Anderson v. Buck*, 66 Iowa, 490; *Ballou v. Lucas*, 59 Iowa, 22. But such knowledge is not essential to a rescission in a case like this. *Smith v. Bricker*, 86 Iowa, 285.

III. The delay in bringing suit for more than five years ought not, under the circumstances, deprive plaintiff of his remedy. Undoubtedly, as contended, he

3. FRAUD:
laches:
evidence. was bound to rescind within a reasonable time after the fraud of defendant was discovered, or might have been discovered by the exercise of ordinary diligence. When was that? In determining this question, we are to begin the inquiry with the assumption

VOL. 120 IOWA.

of the fact, as found, that Campbell, on receipt of his deed, was satisfied with the title conveyed. What happened thereafter to arouse his suspicions? In April or May of the same year, Spears claims that, at Campbell's request, he submitted the abstract to two different lawyers for examination; that each advised that nothing was wrong with the title; and that he so reported to Campbell. Of course, the statement is equivocal, as it is not inconsistent with ownership of Rogers, but it was calculated to lull plaintiff into a more perfect sense of security. During the same season plaintiff went to South Dakota to look at the land, and while there his confidence in Spears was further confirmed by being informed by the person who, as county treasurer, had conveyed the land by tax deed to Rowley, that "the title was all right." If upon his return he said to Spears and wife that the title was bad, as they claim, they certainly convinced him to the contrary, for thereafter no question was raised until December, 1899. At that time he employed an attorney at Plankinton, S. D., to examine the abstract, and was advised that "the title of the land seemed to be in George A. Rogers." Shortly afterwards McIntyre, to whose father he had executed a mortgage on the land in 1886, came to Eagle Grove, and, owing to a remark by Campbell that "something in the abstract did not appear just right, but, in his opinion, the title was all right," persuaded him to consult an attorney. They called upon counsel for appellant, who advised Campbell to go to South Dakota and make a thorough investigation. He did so, copying the records, and submitted the result to said counsel in September, 1900. Immediately following this, demand for the return of the property was made, and upon refusal this suit begun. Certainly nothing occurred subsequent to the trade, prior to December, 1899, to arouse the suspicions of a prudent man. And from that time on it cannot be said, in view of the character of the information received, the

distance to the land, the investigation necessary, and the fact that the situation of the parties continued unchanged, that the plaintiff did not proceed with ordinary diligence. Under all the circumstances, we are inclined to the opinion that the plaintiff cannot be charged with knowledge of the fraud before December, 1899, and that he was not guilty of laches in not bringing his action to rescind until September of the year following. See *Clapp v. Greenlee*, 100 Iowa, 586.

IV. The suggestion is made that, as plaintiff's possession of the land has not been disturbed, he is not in a situation to complain. Apparently, the line of cases fixing the time when a cause of action accrues for breach of the covenants contained in a warranty deed is relied on. *Foshay v. Shafer*, 116 Iowa, 302. But the evidence shows affirmatively that plaintiff never went into actual possession of the land, and, as pointed out in the case cited, a right of action for breach of warranty accrued upon the delivery of the deed. This disposes of the question, without determining whether it has any application to a suit for rescission.

Appellee also argues that there was a misjoinder of causes of action. This objection should have been made by motion to strike, and was waived by failure to do so.

Sections 3547, 3548, Code. The husband of the party making and receiving the conveyances was a proper party. No question is made but that Mary E. Spears is bound by whatever her husband did prior to the exchange of deeds.

V. Notwithstanding the wabbling of plaintiff's counsel on the subject, we discover no difficulty in placing the parties in *statu quo* in decreeing rescission. The deed to plaintiff conveyed nothing, and so there is nothing for him to restore. See *Kelley v. Owens*, 120 Cal. 502 (47 Pac. Rep. 369, 52 Pac. Rep. 797); *McKee v. Eaton*, 26 Kan. 226. But as he has offered to

4. POSSESSION;
disturbance
of.

5. MISJOINDER.

6. ACCOUNTING.

reconvey, and cause the mortgage to McIntyre to be satisfied, he will be permitted to do so. The defendant has expended \$100 for an addition, \$75 for sidewalk, \$15 for a cave, \$10 for seeding down the lawn, \$60 in value of trees, \$150 in taxes, and \$70 in insurance; amounting in all to \$480. There was a mortgage of \$700 on the property, with \$65 accrued interest. March 8, 1898, this mortgage was paid off, and another executed for \$750, on which \$100 has been paid, and \$56 interest. The defendants should then be credited on the loan the \$65 accrued interest, with \$50 reduction on the principal, together with interest on the old loan from April 2, 1895, to March 28, 1899, at eight per cent., or \$223.75. The trial occurred March 8, 1901, and the undisputed evidence shows the rental value of the property to have been \$10 per month, or to April 2, 1901, \$720. In addition to this, plaintiff should be allowed \$37 for the personal property. Balancing accounts results in \$117.75 in the defendants' favor. That such an accounting is appropriate in an action for rescission ought not to be questioned. In *Kerr on Fraud & Mistake* it is said: "The terms on which a reconveyance will be ordered are the repayment of the purchase moneys, and all sums paid out in improvements and repairs of a permanent and substantial nature, by which the present value is improved, with interest thereon from the time when they were actually disbursed. On the other hand, charges for the deterioration of the property must be set off against the allowances for permanent improvements. The party also in possession must account for all rents received by him, and for all profits, such as moneys arising from the sale of timber or from working mines, with interest thereon from the times of the receipt thereof. He must also pay an occupation rent for such parts of the estate as may have been in his actual possession." See, also, *Chaney v. Coleman*, 77 Tex. Sup. 100 (13 S. W. Rep. 850), where a party was allowed for improvements; *Higby v. Whittaker*, 8 Ohio, 198; *Porter v.*

Beattie, 88 Wis. 22 (59 N. W. Rep. 499), where the defendant was allowed to deduct the net income of the land from the amount to be refunded to plaintiff. See, also, *Lurch v. Holder*, (N. J.) 27 Atl. Rep. 81; 6 Cyc. 342. In both *Clapp v. Greenlee*, 100 Iowa, 586, and *Smith v. Bricker*, 86 Iowa, 285, accounts were stated. In the instant case there was not a controverted item, and therefore the parties may be placed in *statu quo*. As defendants have probably continued in possession since March 8, 1901, the cause will be remanded for an accounting up to date. The evidence leaves no doubt but that the property is ample security for the payment of the existing incumbrance. The decree should fix this as an indebtedness of plaintiff, or else require its satisfaction by him, according to conditions as they now appear.—REVERSED.

WEAVER, J., took no part.

GEORGE W. BORDEN v. T. G. ISHERWOOD, Appellant.

Agency: COMMISSIONS: SECONDARY EVIDENCE. In an action partially based on three letters, two of which defendant admitted in his answer, and his testimony as to the contents of the third was substantially as set out in the petition, the fact that the court permitted evidence of their contents without a formal notice to produce was harmless error.

Oral Agreement: EVIDENCE OF. In an action for commissions for the sale of land it is not error to permit evidence of what took place at a public sale of the land, at which time it was alleged the parties made the oral agreement sued on.

Assignment of Error: INSUFFICIENCY OF. An assignment of error that the court erred in refusing to read, and in reading instructions asked and refused, is not sufficiently specific to be considered.

Appeal from Linn District Court.—HON. W. G. THOMPSON,
Judge.

MONDAY, MAY 25, 1903.

ACTION to recover a commission for the sale of land. Verdict and judgment for the plaintiff. The defendant appeals.—*Affirmed.*

Farber & Johnson for appellant.

Chas. W. Kepler for appellee.

SHERWIN, J.—In his petition the plaintiff alleges an oral agreement to sell the defendant's land, and that the terms of the sale finally made by him were arranged by letters between them. He sets out what he claims to have been the substance of the letters written to the defendant by him, stating also that neither the originals nor copies thereof were in his possession, and the defendant's letters to him in full. The petition was filed in October, 1900, and the trial had in August, 1901. In his answer the defendant admits receiving letters from the plaintiff of the number and date stated in the petition, and practically admits the contents of the first two, but denies the alleged contents of the third. No formal notice was served on the defendant requiring him to produce any of the letters written to him by the plaintiff, nor was it shown that the letters were lost or destroyed, the defendant testifying that he had not looked for them, and did not know whether they were in existence or not. Oral testimony of the contents of the letters was then received. The action being founded at least partly upon the letters which passed between the parties, and the petition alleging the defendant's possession of the letters written to him, it would seem to be unnecessary to give a more formal or direct notice for their production at the trial. See Stephen's Digest of Evidence, 141; 2 Phillips, Evidence, 373; *Lawson v. Bachman*, 81 N. Y. 616; *Morrill v. B. & M. R. Co.*, 58 N. H. 68. But we need not determine this question definitely, for, if it be conceded that

I. SECONDARY
evidence.

there was error in the ruling, we are of the opinion that it was without prejudice, because of the testimony of the defendant as to the last letter, he giving its contents substantially as stated by the plaintiff.

There was no error in admitting testimony as to what took place at the attempted public sale of the same land, at which time it is alleged the parties hereto made the oral agreement pleaded.

The question asked the witness Louis Maybauer, covered by the ninth assignment of error, was incompetent, because it clearly called for a conclusion. Nor was there prejudicial error in the ruling complained of in the tenth assignment. The eleventh assignment, to which we are referred in argument, covers a part of the testimony on three pages of the abstract. Neither in the argument nor in the assignment are any specific rulings complained of, and, as a whole, we think them without prejudice.

The assignment of error covering the instructions given is challenged for insufficiency. It states that the court erred in refusing to read and in reading instructions asked and refused. This is not sufficient, under section 4136 of the Code. *Huss v. Chicago G. W. Ry. Co.*, 118 Iowa, 343; *Fitch v. Traction Co.*, 116 Iowa, 716; *Nordine v. Rosenberg*, (Iowa), 89 N. W. Rep. 108.

The judgment is **AFFIRMED**.

IN THE MATTER OF THE CANVASS OF THE STATEMENT OF GENERAL
CONSENT TO THE SALE OF INTOXICATING LIQUORS
FILED WITH THE COUNTY AUDITOR OF POLK COUNTY, IOWA,
ON THE 28TH DAY OF FEBRUARY, 1900.

Intoxicating Liquors: CANVASS OF STATEMENT OF CONSENT. Under

- 1 Code, section 2450, the filing of a general statement of consent to sell intoxicating liquor which is withdrawn, does not preclude the board of supervisors from canvassing another filed during the year. It is the canvass of more than one statement in a single year which is prohibited.

Canvass of Statement of Consent: DUTY OF SUPERVISORS: STIPU-

- 2 LATION. The duty of a board of supervisors in canvassing a statement of consent to sell intoxicating liquor is to inquire into the sufficiency and genuineness of the names affixed thereto; they are not required to investigate the reputation of the persons making affidavit to the signatures, and when it is stipulated that a statement contains a requisite number of signatures of qualified persons to authorize the board to canvass the same and hold it sufficient, the purpose of the law in this respect is complied with.

Appeal from Polk District Court.—HON. C. A. BISHOP,
Judge.

TUESDAY, MAY 26, 1903.

AN appeal was taken in accordance with the provisions of Code, section 2450, from the action of the board of supervisors of Polk county, in holding sufficient a statement of general consent to the sale of intoxicating liquors in Des Moines. The district court affirmed the action of the board of supervisors, and persons who contested the sufficiency of the petition for consent appeal.—*Affirmed.*

Spurrier, Forbes & Mills for appellants.

Reed & Reed, E. T. Morris and J. F. Conrad for appellees.

McCLAIN, J.—Two objections to the action of the district court are raised by the argument for appellants: First, did the fact that a prior petition for consent had been presented to the board of supervisors during the year, which had been withdrawn before being finally acted upon, render it illegal for the board to approve the petition for consent which was finally approved? and, second, did the trial court err in considering the petition, in the absence of evidence that the persons who made affidavits to the signing of the names on the petition were reputable persons, or in refusing to receive evidence that they were not reputable, in view of an admission made on the trial of the case that a sufficient number of genuine signatures of names of persons legally voting at the preceding election were attached to such petition to constitute a majority of the legal voters of the county, as required by Code, section 2452?

I. It is provided in Code, section 2450: "Only one statement of general consent from any county, city, or town * * * therein entitled to file the same shall be canvassed by the board of supervisors in any one year." The record shows that on December 30, 1899, a statement of consent was filed in the office of the auditor of Polk county, and notice was published of the canvass thereof to be made January 17, 1900. Whether or not this notice was sufficient is, in the view we take of the case, immaterial. The hearing was continued from time to time, and subsequent notices were given, but before the statement thus filed was finally canvassed by the board of supervisors, to wit, on the 28th day of February, 1900, another statement was filed, and finally acted upon after due notice, the statement of consent first filed having been withdrawn in the meantime on the last day fixed by the board of supervisors by continuance for the consideration thereof.

The contention for appellants is, practically, that when one statement of consent is filed, on which, by proper pro-

ceedings, a final hearing might be had, the board cannot within a year, consider any other statement, irrespective of whether the first statement filed is ever acted upon by the board. But the statutory language already quoted relates to the canvass by the board of the statement of consent, and not to the filing thereof. It needs no elaborate discussion of the words used to support the conclusion that the legislative intent was to prevent such a question being brought before the board a second time within a year after it has once finally acted. However desirable it might be, as a matter of public policy, that the people of the community be not agitated by the circulation of more than one petition during the same year, no purpose to prevent such action is indicated in the language used. The idea seems rather to be that the board of supervisors is not to be compelled or allowed to finally act in such matter more than once within one year, and, in view of the difficulties attending the canvassing of a statement of consent, the provision seems reasonable, and ought to be given full force and effect. But we cannot stretch the language to cover a case not within the reasonable meaning of the words used. If the first statement filed is insufficient, and, before the board has finally acted upon it by making the canvass necessary to determine its sufficiency, another statement, which is sufficient, is filed, and properly brought up for consideration, we see no reason why the second statement may not be approved. In this respect the action of the board of supervisors seems to have been legal.

II. The stipulation already referred to which was entered into by attorneys with a view to the trial of this matter in the district court on appeal, contains admissions as to the population of the city, the number of votes cast at the preceding general election and the number of genuine signatures to the statement; and it is conceded that these admissions are such as to show the sufficiency of the

statement in this respect. But it was objected to the admission of this stipulation in evidence that the persons who made affidavit to the genuineness of the signatures were not shown to be reputable persons. The language of the Code provision in this respect is as follows: "Sec. 2452. The signing the name of another to any statement of general consent provided for in the sections of this chapter relating to the mulct tax shall be punishable as forgery, and every such statement shall be accompanied by the affidavit of some reputable person, showing that said person personally witnessed the signing of each name appearing thereon, and any false statement contained in such affidavit shall be punishable as perjury, and all provisions of law relative to the bribery of voters are hereby made applicable to the bribery of signers to any such statement of general consent. All statements of general consent shall show the voting precinct of the signers thereof, and date of signing, and no name shall be counted that was not signed within thirty days prior to the filing of such statement of general consent."

It is evident that the object of the legislature in adopting this provision was to secure a genuine statement—that is, one signed by the requisite number of qualified persons—and to furnish to the board of supervisors a *prima facie* showing by way of affidavit that the signatures relied on are genuine. When it was stipulated that a sufficient number of signatures to the petition or statement now in question were genuine signatures of qualified persons to authorize the board to canvass the statement and hold it sufficient, then the purpose of the law was complied with, and the affidavits as to the genuineness of the signatures ceased to be material. It certainly cannot be true that under such circumstances the board is required to pass upon the reputation of the persons making such affidavits. If the genuineness

2. CANVASS of
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of the signatures is left to the determination of the board, then, although, no doubt, the persons making the affidavits would be deemed reputable until the contrary was shown, evidence would perhaps be admissible to impeach their reputation. But certainly we ought not to require the board to consider impeaching evidence as to the persons making affidavits when the very purpose for which the affidavits were made and to be used had already been accomplished by stipulation. To adopt the theory of appellant would be to make the granting of a petition of consent depend not alone on whether it had the requisite number of genuine signatures of qualified persons, but also on whether those making affidavit as to the genuineness of the signatures were all of them reputable. Certainly we should not assume that a collateral investigation of this kind is required further than it shall be found essential in determining the ultimate fact which is presented to the board.

Finding no error in the action of the lower court, its judgment is **AFFIRMED**.

BISHOP, C. J., takes no part.

HENRY WORMELY, Appellee, v. THE MASON CITY & FORT DODGE RAILWAY COMPANY, Appellant.

Railroads: CONDEMNATION: TAXATION OF ATTORNEYS' FEES: APPORTIONMENT OF COSTS. In a condemnation proceeding, where a trial on appeal to the district court results in a reduction of the damages assessed, the court has no authority to tax against the railway company an attorney's fee for plaintiff's attorney or to apportion the costs, under Code, section 2007.

Appeal from Wright District Court.—HON. W. S. KENYON,
Judge.

TUESDAY, MAY 26, 1903.

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APPEAL from an order taxing an attorney's fee for plaintiff's attorney in a condemnation proceeding, and form an order apportioning said fee.—*Reversed.*

Healy Bros. & Kelleher and *B. P. Birdsall* for appellant.

Nagle & Nagle for appellee.

DEEMER, J.—The defendant company condemned a right of way across plaintiff's land. The sheriff's jury having awarded damages in the sum of \$1,450, the company appealed, and upon a trial in the district court the amount of the award was reduced to \$800. After the return of the verdict, the plaintiff filed a motion to tax an attorney's fee for his attorney, and to make an equitable apportionment of the costs on appeal. This motion was sustained, and as a part of the costs an attorney's fee of \$100 for plaintiff's attorney was taxed, and each party was required to pay one-half the costs of the appeal, including the attorney's fee. The appeal is from this order.

Code, section 2007, provides that "the corporation shall pay all the costs of the assessment made by the commissioners and those occasioned by the appeal, including a reasonable attorney's fee to be taxed by the court, unless on the trial thereof the same or a less amount of damages is awarded than was allowed by the commissioners." As a general rule, attorney's fees are not awarded either as damages or as a part of the costs of a proceeding in court. In exceptional cases they have been awarded as damages, but such cases are wholly exceptional, and have no application to the question now before us. When taxed as costs, it is by reason of some special statutory provision. In order that they may be so taxed, the case must come clearly within the terms of the statute. But for the provision of section 2007, before quoted, attorney's fees on appeal in a condemnation proceeding could not

be taxed; hence we must look to the terms of that statute to determine whether or not the fee allowed in this case should have been taxed. In this respect attorney's fees differ from the ordinary taxable costs. These are not taxed under this statute, but by reason of the general provisions of the Code relating to costs. Turning, then, to this statute, we find that the fee is for services rendered on the appeal, and not for an appearance or other employment connected with the proceedings before the commissioners. They are then to be taxed by the court for services rendered on the appeal, but such allowance is plainly conditional on an award of damages equal to the amount allowed by the commissioners. The statute reads, "including a reasonable attorney's fee to be taxed by the court, unless on the trial thereof the same or a less amount of damage is awarded than was allowed by the commissioners." The statute has a double aspect. It relates not only to the taxation of a fee provided by the statute itself, but also to other costs which are taxed under general statutes relating to such matters. Going to this statute for the source of authority to tax attorney's fees, and finding a limitation upon that right, this limitation cannot be disregarded. It is clear, therefore, we think, that attorney's fees are not to be taxed, unless on the trial the award is at least equal to that allowed by the commissioners. The order for apportionment, whereby defendant was adjudged to pay one half of this fee, and judgment was rendered against plaintiff for the other half, found in favor of his own attorney, is a matter, perhaps, of which the defendant should not be heard to complain, in the event it were found that such fee should be taxed and allowed, yet the effect of such an order may be considered in determining the proper construction to be placed upon the statute. We have already held that, notwithstanding the wording of this provision of the Code, properly taxable costs may be apportioned. *Noble v. Railroad*, 61 Iowa,

687; *Jones v. Coal Co.*, 47 Iowa, 85. The statute says that a reasonable attorney's fee is to be taxed by the court, and allowed as part of the costs. In view of our holding with reference to apportionment, it would seem that this fee, when allowed, if appellee's contention be correct, is not a reasonable fee, but one-half or some other fraction thereof, as the court may determine when making an order for apportionment. Moreover, we should have the anomalous situation of a court rendering judgment against plaintiff for some fraction of a reasonable fee due to his own attorney. That this was not contemplated by the legislature, is too clear for argument. Indeed, we think the provision is so plain that it is not open to construction. It is only obscure when attempt is made to depart from the plain language used. If appellee's contention be correct, it follows that he is not allowed a reasonable attorney's fee, but some other amount, depending upon the discretion of the court in apportioning the costs under the rule announced in the cases heretofore cited. The question, as we have already said, is not one of apportionment, but of authority to tax attorney's fees. That authority is found in this statute, and nowhere else, and is conditioned upon the amount of damages awarded. Unless this condition be fulfilled, there is no authority for taxing the fee. The matter of apportionment is not material, except as it throws light upon the proper interpretation to be placed upon the language used. That the consequences of a particular interpretation may be taken into account in arriving at the true intent of the legislature is well settled, and needs no citation of authorities in its support. As the amount allowed by the trial jury was much less than the sum awarded plaintiff by the commissioners, there was no authority for taxing an attorney's fee to plaintiff's attorney as a part of the costs occasioned by the appeal. As said by this court in *Mellichar v. City*, 116 Iowa, 390, in referring to section 2007 of the Code: "The costs made

by the commissioners are to be paid by the corporation in any event. Only those on appeal to the district court, and attorney's fees occasioned thereby, depend in any way on the result of the trial. These are to be taxed against the corporation, except in the contingency of a trial at which the amount of damages is not increased. If that contingency does not arise, according to the plain language of the statute, they are to be paid by the corporation. It is only when the appeal has been shown in the manner pointed out to have been improvidently taken that the corporation is relieved from the payment of the costs occasioned thereby." In *Heath v. Mason City Co.* (Iowa), 94 N.W. Rep. 467, this statement was again approved, and we there said: "Perhaps an attorney's fee is not to be allowed plaintiff unless he recovers on the trial of the appeal more than was awarded him by the commissioners, but this we do not at this time decide. It is enough to say that the appealing railway company cannot avoid the payment of attorney's fees, unless upon a trial the same or a less amount is awarded than that fixed by the commissioners." Keeping in mind the fact that this provision of the Code is the only authority for taxing attorney's fees, and looking to the evident purpose of the legislature in providing therefor, it is manifest, we think, that the fee should not be allowed plaintiff's attorney when the appealing railway company secures a material reduction of the amount allowed by the commissioners. It surely should not pay a penalty when successful on its appeal. It was not required to make a tender to avoid the payment of attorney's fees, because these fees may only be taxed, under the terms of the statute authorizing them, when the award is the same or greater than that allowed by the sheriff's jury. It would be unjust to hold a successful appellant liable for the payment of his adversary's attorney's fee.

The trial court was in error in taxing the attorney's fee, and its order must therefore be REVERSED.

SARAH E. JELLY, Appellee, v. MUSCATINE CITY AND COUNTY
MUTUAL AID SOCIETY *et al.*, Appellants.

Mutual Benefit Society: SUSPENSION: FAILURE TO PAY DUES.

A provision in the constitution of a mutual benefit society that a member failing to pay his assessment within fifteen days after being notified by the secretary shall be suspended is not a self-executing provision, and a member who has failed to pay within the time is still in good standing, no action having been taken to suspend him.

Appeal from Muscatine District Court.—HON. E. J. HOUSE,
Judge.

TUESDAY, MAY 26, 1903.

ACTION in equity, based upon a certificate of membership in the defendant society. A demurrer to the answer filed by defendants was sustained, and, defendants refusing to plead further, there was a decree in favor of plaintiff as prayed. Defendants appeal.—*Affirmed.*

E. M. Warner for appellants.

Jayne & Hoffman for appellee.

BISHOP, C. J.—The certificate upon which suit is brought was issued by the defendant society to J. A. Jelly in his lifetime, the date thereof being April 3, 1889. This plaintiff, widow of said J. A. Jelly, is the beneficiary named in such certificate. The certificate is set out by copy in the petition, and therein it is provided that upon the death of said J. A. Jelly his beneficiary shall be entitled to participate in the beneficiary fund of the society to the amount of \$1 for each valid certificate then in force; this, however, upon the condition that said Jelly shall have complied in every particular with all the laws,

rules, and requirements of said society. It is alleged that Jelly died March 31, 1900; that proper proofs of death were furnished to defendant; and that payment has been demanded and refused. The answer admits the issuance of the certificate and the death of Jelly. It is then alleged that the defendant society is one organized for the mutual benefit of its members, and that by its constitution it is provided, among other things, as follows:

"Art. 9. Upon notification of the death of a member by the secretary, each surviving member shall pay to the secretary the sum of one dollar; and if not paid within fifteen days, the party failing to pay shall be suspended from all benefits of the association.

"Art. 10. When a member has been suspended for non-payment of assessments, it shall be the duty of the secretary to notify such member of the facts, and if such member pays up all arrearages within thirty days therefrom, he shall be reinstated without action of the association; otherwise he shall be dropped from the roll of membership."

The allegation follows that on March 1, 1900, one Gergen, a member of said society in good standing, died, and that on March 5, 1900, notice of such death was given to said J. A. Jelly, and that he, said Jelly, failed and neglected to pay to the secretary the sum of \$1 as provided for by his contract with the society; and defendants say that by reason of such failure and neglect said Jelly became suspended from all benefits in the society. In the demurrer to such answer it is said that the matters set up therein do not constitute any defense to plaintiff's action, for that it does not appear therefrom that said Jelly had ever been suspended from said society, or that he was not in good standing at the time of his death.

We think the demurrer was properly sustained. It is clear that the latter clause of article 9 of the constitution which we have quoted was not intended to be self-execut-

ing. Some affirmative action on the part of the association was contemplated before the certificate holder should become suspended. The expression "shall be suspended," as the same appears in said article, is declaratory merely of the right of the association to suspend for nonpayment of assessments, and it cannot be said that membership or standing has been lost or forfeited as long as the society does not see fit to exercise such right. A mere delinquency of a member of a mutual benefit association to pay dues or assessments does not defeat his good standing as long as he has a right to pay and the association forbears to take action. This conclusion finds ample support in the authorities. Among others that might be cited, see the following: *Warwick v. Sup. Conclave*, 107 Ga. 115 (82 S. E. Rep. 952); *Petherick v. Order*, 114 Mich. 420 (72 N. W. Rep. 262); *Association v. Schauss*, 148 Ill. 304 (35 N. E. Rep. 747); *Puhr v. Grand Lodge*, 77 Mo. App. 47; 21 Am. & Eng. Ency. 292; Bacon on Mutual Benefit Association, section 385.

It may be conceded that a mutual benefit society may so provide in its contracts of membership that a mere failure to pay assessments, without more, shall operate *ipso facto* to forfeit all the rights of the delinquent member. To this effect are the cases of *Bosworth v. Aid Society*, 75 Iowa, 582, and *Leffingwell v. Grand Lodge*, 86 Iowa, 279, cited and relied upon by appellant. But the contract of membership exhibited in the case at bar contains no such self-executing provision. On the contrary, it provides by fair construction not only for affirmative action on the part of the society, but for thirty days of grace to the member after he is notified of such action. In contracts of this character, force is to be given the provisions thereof which will sustain the contract rather than work a forfeiture. *Warwick v. Sup. Conclave*, *supra*; *McMaster v. Ins. Co.* (C. C.) 90 Fed. Rep. 40.

It follows from what we have said that the judgment of the court below should be, and it is, **AFFIRMED**.

WILLIAM N. ROSS, Appellant, v. MODERN BROTHERHOOD OF AMERICA.

Mutual Benefit Association: AFTER ENACTED BYLAWS: EFFECT OF.

- 1 It is competent for a mutual benefit association and a certificate holder to contract to be bound by by-laws to be enacted in the future.

By-Laws: REASONABLENESS: BROKEN LEG: DEFINITION. A by-law

- 2 defining a broken leg, for which a benefit association shall be liable under its certificate of indemnity, to be breaking the shaft of the thigh bone between the hip and knee joint, or breaking the shafts of both bones between the knee and ankle joints, is reasonable, and a certificate holder receiving an injury of such character after the adoption of such by-law is bound thereby, where, by the terms of the original contract, the parties agree to be bound by future enacted by-laws.

Appeal from Buchanan District Court.—HON. F. C. PLATT, Judge.

TUESDAY, MAY 26, 1903.

THE defendant is a mutual benefit association, and on the 4th day of May, 1897, issued to the plaintiff its certificate of membership and insurance, which provided for the payment of \$200 "for each broken arm or leg resulting from accident." The certificate also contained the following agreement: "This benefit certificate is issued and accepted upon the following express warranties, conditions and agreements: First. This certificate, the articles of incorporation, fundamental laws, by-laws, rules and regulations of this fraternity, now in force or which may be hereafter adopted, and the application for membership, including the physician's report, a copy of which is hereto attached, shall together, constitute the exclusive contract between this fraternity, the member and the beneficiary."

In October, 1900, the supreme lodge of the defendant regularly adopted a by-law defining what should constitute a broken leg within the meaning of its certificate, as follows: "The breaking of a leg is specifically defined to be the breaking of the shaft of the thigh bone between the hip and the knee joints, or the breaking of the shafts of both bones between the knee and ankle joints, and no payment will be made for a broken * * * leg unless the same comes under the definition of a broken * * * leg as above set out." In February, 1901, the plaintiff had one bone of the right leg broken between the knee and ankle joint, and brings this action to recover therefor under his certificate. The defendant alleges no liability under the by-laws in force at the time of the accident. The case was tried in equity upon an agreed statement of facts, and a judgment rendered for the defendant. The plaintiff appeals.—*Affirmed.*

F. E. Hasner for appellant.

Grimm, Trewin & Moffit and *Barry Gilbert* for appellee.

SHERWIN, J.—Before the adoption of the by-laws of October, 1900, defining specifically what should constitute a broken leg, there was no definition or regulation governing this matter, as we understand the record; and it is conceded that, if the plaintiff is not bound by this enactment, he is entitled to recover. The plaintiff's action is based upon the certificate issued to him by the defendant, and it is the contract upon which his rights against the defendant must rest, and by which the liability of the defendant must be measured. The certificate which the plaintiff accepted as his contract with the defendant provides that "the articles of incorporation, fundamental laws, by-laws, rules, and regulations * * * now in force, or which may be hereafter adopted, shall together constitute the exclusive contract" between the parties.

It is, of course, elementary that parties competent to contract may make such contracts as they see fit, so long as the public is not injured thereby, and that courts will do no more than to construe them as they find them, regardless of the consequences to either of the contracting parties. It is argued that the by-law under consideration is unreasonable, and therefore does not bind the plaintiff. But the language of the contract is broad, and clearly and expressly provides that future by-laws and rules and regulations shall constitute a part thereof. We know of no reason why parties may not contract to be bound by future enactments, and that such enactments may enter into and form a part of their contracts; but, on the other hand, we believe it to be the general holding that they may. *Hobbs v. Iowa Ben. Ass'n.*, 82 Iowa, 107; *Seiverts v. Ben. Ass'n.*, 95 Iowa, 710; 1 Bacon on Benefit Societies, sections 91, 92, 185; *Stohr v. San Fran. Mus. Fund Soc.*, (Cal.) 22 Pac. Rep. 1125; *Loeffler v. Modern Woodmen*, 100 Wis. 79 (75 N. W. Rep. 1012); *Schmidt v. Supreme Tent*, 97 Wis. 528 (73 N. W. Rep. 22); *Supreme Com. v. Ainsworth*, 71 Ala. 449 (46 Am. Rep. 332). See, also, note in *Strauss v. Association*, 126 N. C. 971 (36 S. E. Rep. 352, 39 S. E. Rep. 55, 88 Am. St. Rep. 706).

But if it be conceded for the purposes of this case that changes in by-laws under such an agreement can only be reasonable, we think the change here should be held valid.

A mutual association of this kind is for the benefit of a great number, and its affairs must be conducted for the greatest good of the greatest number, and its internal affairs must of necessity be governed very largely by its proper officers without interference by the courts, and we should not hold by-laws unreasonable which have been expressly consented to in advance, except upon the clearest and most satisfactory showing. There was no previous design-

1. AFTER enacted by laws: effect of.

2. BY-LAWS: reasonable-ness: broken leg: definition

ation as to what a broken leg meant, and it may have been necessary for the proper protection of the great body of members to certainly define what it did mean under the terms of the certificates, and we think such action was not unreasonable. What has already been said is sufficient to show that the defendant had no vested right in his certificate which could not be changed by the agreement he entered into. It may be doubtful whether a change in a by-law after an injury had been received could be made to affect the right to recover, but we do not determine the question because it is not in this case.

It is contended that the new by-law is not retroactive. This may be conceded, and, if we were asked to apply it to a case of injury before its enactment, we are inclined to think the contention sound; but the by-law clearly says what shall be deemed a broken leg after its enactment, and, as the plaintiff's injury was in fact received thereafter, and when it was in force, it is clear that it was intended to and does apply to his case. *Bowie v. Grand Lodge*, 99 Cal. 392 (34 Pac. Rep. 103); *Stohr v. San Francisco Musical Fund Soc.*, *supra*.

The judgment is AFFIRMED.

C. R. HUNT, Appellant, v. WM. HOPLEY.

School Funds: DEPOSIT IN BANK: GUARANTY OF REPAYMENT. VALIDITY. A school township treasurer may rightfully make a general deposit of the funds of his district in a solvent bank in his name as such treasurer, and the title to the fund will not thereby pass to the bank nor does it amount to a conversion; and any guaranty which the bank may give to secure him against loss in case of its failure is not invalid, either on the ground that the deposit was wrongful or as against public policy.

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128	278
120	695
130	800
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120	695
136	83
120	695
139	60
139	92

Appeal from Cass District Court.—HON. W. R. GREEN,
Judge.

TUESDAY, MAY 26, 1903.

THE plaintiff alleged that his term of office as school treasurer was about to expire, and A. W. Dickerson, then the cashier of the Cass County Bank, inquired of the plaintiff if he would be re-elected as his own successor as school treasurer, and plaintiff then informed said Dickerson that if he was re-elected he would remove the school funds from said Cass County Bank unless he was indemnified against loss; that thereafter he was re-elected as such school treasurer, and then demanded that the Cass County Bank give him some indemnity against loss, or he would demand and take the funds of the school district away from the said bank; that thereupon the said Dickerson inquired if a written indemnity signed by Isaac Dickerson, J. C. Yetzer, and William Hopley would be sufficient, and if it would satisfy the plaintiff to leave the said funds then in the bank, and further deposit such additional sums of school funds as might come into his possession as such treasurer; that the plaintiff informed said Dickerson that he would accept the indemnity, and thereupon a written contract in words following was executed "Atlantic, Iowa, October 23, 1893. We hereby guarantee C. R. Hunt, Treas. Washington Township, Cass County, Iowa, from any loss that he may incur by reason of depositing money with the Cass County Bank of Atlantic, Iowa. Isaac Dickerson. William Hopley, J. C. Yetzer." The guaranty was accepted by plaintiff, and in reliance thereon the funds already in the bank left there, and additional funds deposited. "All the said funds were deposited in the said bank in the name of the plaintiff as treasurer of said district township, and not in his individual name. That no other funds were commingled therewith in making

the said deposits, and all of the said funds were the property of the said district township. That the said bank received and retained all of the benefit arising out of the deposit of said school funds therein, as contemplated in the execution and delivery of the said bond or written guaranty for the purpose of keeping the said funds then on deposit therein, and the deposit of all future sums coming into the hands and possession of the plaintiff as such school treasurer, and that the plaintiff has performed his part of the said contract and agreement, by the deposit in said bank of all the school funds which came into his hands prior to the said failure of the said bank, and by leaving on deposit therein the funds already deposited by him in the said bank at the date of the said bond or written guaranty." The bank failed, and part of the moneys so deposited was lost, which plaintiff has made good to the district, and now demands recovery on the guaranty. There were some other allegations in the petition, not necessary to set out. The defendant's demurrer, to the effect that the deposit was wrongful, and that the taking of security to indemnify an officer against loss which may result from his wrongful act is against public policy, was sustained. Plaintiff elected to stand on the ruling, the petition was dismissed, and he appeals. — *Reversed.*

DeLano & Meredith for appellant.

Swan & Bruce for appellee.

LADD, J.—The defendants' guaranty was against any loss plaintiff, as school treasurer, might incur by reason of depositing money with the Cass County Bank. If he had the right to so deposit the public money, the instrument is valid. The contention of appellee is that the law forbids such an officer from making a general deposit of public money, even though in his name as such, for the reason that thereby the title to the fund passes to the

bank, and a technical conversion results, and that any contract having a tendency to induce an officer to swerve from the line of duty is, of necessity, inimical to the principles of sound public policy. Were this position correct, it would be a matter of profound regret, for nearly every county, city, and school district treasurer in the state has interpreted the law otherwise, and, according to this view, placed the funds of the public in jeopardy, and exposed himself to criminal prosecution. For, if depositing with a bank for safe keeping amounts to conversion, they would seem to be open to the charge of embezzlement, and might have difficulty in regaining the moneys from the depositories participating in the wrong by receiving the funds. Common prudence seems generally to have dictated the deposit of public moneys with solvent banking corporations for safe keeping. To require the officer to retain these in his personal custody would impose an exceedingly onerous burden, so out of keeping with what is deemed essential for the safety of the funds that one so proposing would experience difficulty in procuring sureties on his official bond. We have discovered nothing in the statutes of this state forbidding the deposits in solvent banks by school treasurers. The only section which might be so construed is section 1747 of the Code of 1873, providing that "he [the treasurer] shall hold all moneys belonging to the district and pay out the same on the order of the president, countersigned by the secretary." But "hold," as there used, ought not to be construed as exacting the physical retention of the money. All intended is that the officer retain control, and keep it subject to the payment of orders when properly signed. That is precisely what is done with money deposited. It cannot again be regained in kind, nor is this essential. Its equivalent answers every purpose, and this is returned on demand. The transaction differs essentially from a loan. That is for the benefit of the borrower, while a deposit is for the benefit of the

depositor. The depositary may obtain an incidental advantage, but that is seldom the original object contemplated. In a loan the borrower promises to return the money at a future time; in a deposit, whenever the money is demanded. True, the technical relation of creditor and debtor springs from the making of deposits, but few of the many people who daily leave money with banks for safe keeping, and exact the return of an equivalent amount, ever think of the transaction as a loan, or ever speak of it as such. In *Independent School District of Sioux City v. Hubbard*, 110 Iowa, 58, the settlement of the treasurer with the board of directors was involved; and, with respect to certificates of deposit actually representing money payable on demand, this court said: "We are of opinion that, if certificates actually represented cash within the control of the treasurer, which could and would have been produced had the board of directors so demanded, they should be treated as money in a suit on the official bond. To hold otherwise would ignore business usages, and give undeserved importance to an irregularity which could not have affected the rights of any one concerned."

The distinction between a deposit and a loan is illustrated in that case, for, while demand certificates of deposit on solvent banks were treated as equivalent to cash, time certificates bearing interest were denounced as private loans of public money, amounting to conversion. In *Law's Estate*, 144 Pa. 499 (22 Atl. Rep. 831, 14 L. R. A. 108), the difference was pointed out: "deposit is where a sum of money is left with a banker for safe keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or it may not bear interest, according to the agreement. While the relation between the depositor and his banker is that of debtor and creditor, simply, the transaction cannot, in any proper sense, be regarded as a loan, unless the money is left, not

for safe keeping, but for a fixed period, at interest, in which case the transaction assumes the characteristics of a loan." The Supreme Court of Wisconsin applied the same principle in *State v. McFetridge*, 84 Wis. 473 (54 N. W. Rep. 1, 998, 20 L. R. A. 223), in adjudging general deposits not investments, within the meaning of the statute of that state forbidding such by the state treasurer, saying: "By such deposit the depositor does not lose control of the money, but may reclaim it at any time. True, he loses control of the specific coin or currency deposited, but not of an equal amount of coin or currency having the same qualities and value, which, as we have seen, is all that is required of him. But if funds in the treasury are invested in United States or state bonds, or in loans on time to counties, cities, etc., the treasurer loses control thereof; and the same cannot be replaced in the treasury until the bonds are paid or sold, or such loans become due, and are collected by due course of law. The retention by the treasurer of substantial control over the funds in the one case, and his loss of such control in the other, make the leading distinction between a mere deposit of the funds and an 'investment' thereof, as those terms are used in the statutes." See, also, opinion by Post, C. J., in *State v. Hill*, 47 Neb. 456 (66 N. W. Rep. 554); *City of Lansing v. Wood*, 57 Mich. 201 (23 N. W. Rep. 769); *Allibone v. Ames*, 9 S. D. 74 (68 N. W. Rep. 156, 33 L. R. A. 585); *Norwood v. Harness*, 98 Ind. 134 (49 Am. Rep. 739).

A trustee may take the precaution of leaving the trust funds with a bank for preservation, *Officer v. Officer*, 120 Iowa, 389, and we can see no reason for denying a school treasurer the right to equal protection in placing the moneys of his district within the safe keeping of a solvent bank, also. Under the prior decisions of this court he is, because of the conditions of his bond, practically an insurer of the safety of the public revenues coming into his hands. *District Tp. v. Morton*, 37 Iowa, 551; *District*

Tp. v. Smith, 39 Iowa, 10; *District Tp. v. Hardinbrook*, 40 Iowa, 180. He is not furnished with a vault or other suitable receptacle, and it is well recognized that a special is not as safe as a general deposit. Must he, at his peril, carry the large sums of public money coming into his keeping on his person, or stow them away at his home or place of business, thereby taking risks of loss, destruction, or larceny, not to be thought of in the care of his own property? A number of courts apply precisely the same rules with respect to public officers as to trustees, and not only hold that they may make general deposits of public moneys coming into their hands, but are liable in event of loss only when failing to exercise due care and diligence.

Wilson v. People of Colorado, 19 Colo. 199 (34 Pac. Rep. 944, 22 L. R. A. 449, 41 Am. St. Rep. 243); *York County v. Watson*, 15 S. C. 1 (40 Am. Rep. 675); see 23 Am. & Eng. Ency. of law, (2d Ed.) 374. The liability of the officer, however, is to be controlled by the conditions entering into his bond. *Ross v. Hatch*, 5 Iowa, 149. And even where held to be absolutely liable, he is accorded the right of placing public funds coming into his hands in a solvent bank for safe keeping. *State v. McFetridge*, 84 Wis. 473 (54 N. W. Rep. 1, 998, 20 L. R. A. 223); *State v. Hill*, 47 Neb. 456 (66 N. W. Rep. 554); *Allibone v. Ames*, 9 S. D. 74 (68 N. W. Rep. 165, 33 L. R. A. 585). This is on the ground that in so doing it does not pass beyond his control. While not in his physical possession, it is accessible upon demand, and hence the making of such deposits is not regarded as a conversion of the funds. True, language inconsistent with this view may be found in several of our previous decisions. Thus in *Independent Dist. of Boyer v. King*, 80 Iowa, 497, the making of a deposit is said to be a loan, but the question was not there involved. Wilson, the treasurer of the district, had deposited the public money to his individual credit; and the issues were whether this act was wrongful, and whether the claim of the district

might be established as preferred without tracing the identical money deposited by him. It was clearly an appropriation of the money, and the fact that the bank was informed of the fact made no difference. *Long v. Emsley*, 57 Iowa, 11. Decisions are numerous to the effect that a deposit by a trustee in his individual capacity is a conversion. See *Officer v. Officer*, *supra*; and in *Williams v. Williams*, 55 Wis. 800 (12 N. W. Rep. 465, 13 N. W. Rep. 274, 42 Am. Rep. 708), it was declared immaterial whether the officers were informed at the time that the funds were trust funds. In *Naltner v. Dolan*, 108 Ind. 500 (8 N. E. Rep. 289, 58 Am. Rep. 61), the only way of escaping liability was pointed out to be the depositing of the trust property, either in the *cestui que* trust's name, or in some way distinguishing it as such on the books of the bank. It must not be made in the name of the trustee individually, else he will become individually liable upon the bank's failure. *Jenkins v. Walter*, 29 Am. Dec. 539; *Com. v. McAlister*, 28 Pa. 480; *Summers v. Reynolds*, 95 N. C. 404. In *Independent Dist v. Hubbard*, *supra*, the question was whether money should be produced by the treasurer in making his annual settlements; and, in holding that it should, it was remarked that he had no right to make deposits. But what was meant by "money," as there used, was not defined, and later in the same opinion the legality of a general deposit was recognized. In none of these decisions was the point under consideration necessarily involved. But in *Lowry v. Polk County*, 51 Iowa, 50—an action by a county treasurer to recover money of the county, lost through the failure of a bank in which it was deposited—the court rests its decision squarely upon the proposition that a general deposit is a loan, was prohibited by section 912 of the Code of 1873, forbidding the county treasurer from "loaning out" county funds in their hands, and amounted to a conversion to his own use. If that decision is to be adhered to, then the hundreds of public

officials of this state who have placed the moneys coming into their hands as such in the solvent banks of the state for safe keeping, in pursuance of a custom prevailing since the formation of this commonwealth, and in harmony with business usages of the commercial world, must be denounced as embezzlers, for section 4840 of the Code declares that "if any state, county, township, school or municipal officer, or officer of any state institution * * * loans without authority any portion of the public money entrusted to him for collection, safekeeping, transfer or disbursement or converts to his own use any money or property that may come into his hands by virtue of his office he shall be guilty of embezzlement." We are not ready to so declare. Better that *Lowry v. Polk Co.* in so far as holding the general deposit of money a loan, be overruled. It has been disregarded, because of business necessity and prudence, ever since announced. It is unsound in principle and contrary to authority.

In the instant case the deposits were made in the name of the treasurer of the district, as such. No time of credit was given. He did not lose control, for at any moment payment might have been exacted. The bank, as appears from the petition, was then supposed to be reputable, but he took the additional precaution of requiring a guaranty of its solvency and fidelity; thereby providing indemnity against possible loss for the district as well as himself. This he had the right to do, and may recover on such security.—REVERSED.

GEORGE S. STREETER, Appellant, v. A. M. GLEASON, Defendant, ANDREAS JENSEN, Garnishee, Appellees.

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122 14

Garnishment: SETTING ASIDE JUDGMENT. The entry of judgment

- 1 against a garnishee and approval of the record does not deprive the court of power to set the judgment aside and reopen the proceeding on a motion of the garnishee made at the same term.

Same: INSUFFICIENT NOTICE. Where a judgment against a garnishee is entered upon an insufficient notice to the judgment defendant, the same is premature, if not void for want of jurisdiction and should be set aside.

Garnishee: JUDGMENT AGAINST. Judgment on the answer of a garnishee admitting an indebtedness to become due at a future time is unauthorized prior to the time the liability becomes fixed.

Same. Where the garnishee in his first answer admits liability, but in a second, relating to the same debt and same judgment debtor shows that the same is conditional, judgment should not be entered, and if entered will be set aside on motion.

Liability of Garnishee: EVIDENCE OF. To charge a garnishee upon his answer alone, his liability should clearly appear.

Appeal from Buena Vista District Court.—HON. A. D. BAILIE, Judge.

TUESDAY, MAY 22, 1903.

THE opinion states the case.—*Affirmed.*

J. A. Tracy for appellant.

W. L. Smith and *H. F. Schultz* for appellees.

WEAVER, J.—The appellant, having obtained a judgment against the defendant Gleason, caused an execution to issue thereon, under which writ Jensen was garnished February 5, 1901. At the time of such service Jensen signed a written answer to the sheriff to the effect that he was owing the defendant \$650, which would be due March 1, 1901. Thereafter, and before any further proceedings were had upon said garnishment, another execution was issued, and on February 19, 1901, Jensen's answers as garnishee were again taken by the sheriff. In this answer the nature of the transaction between Gleason and Jensen was explained as being a contract for the purchase of land from the former by the latter, and that the

sum of \$650 was to be paid on the execution and delivery to the garnishee of a deed for the property so purchased, but such deed had not yet been delivered. On February 26, 1901, notice of the first garnishment was served on Gleason in the state of Minnesota, but no return of such service was made until March 11, 1901. On March 8, 1901, the garnishee having made no appearance, plaintiff moved for judgment against him on his first answer, and judgment was so entered for the sum of \$407.40 and costs. On April 4, 1901, and during the same term of court, the garnishee appeared and filed a motion, sustained by affidavits, to set aside said judgment, restating the facts set forth in his answers of February 19, 1901, and showing that his contract with Gleason required him to pay only upon the conveyance of the land; that in truth at the time of said garnishment (though then unknown to garnishee), Gleason had conveyed the land to another person, from whom the title must come to the garnishee; and that the indebtedness of \$650 became and was due from the garnishee to the holder of said title, and not to Gleason. The garnishee further showed that he was of foreign birth, unable to clearly understand the English language; did not fully comprehend the nature of the papers served upon him; and did not suppose he was required to attend court to protect his rights, or that any judgment could be rendered against him without further opportunity to defend, and only learned otherwise when the sheriff appeared with an execution and levied upon his property. The court sustained the motion to set aside the judgment against the garnishee, and from said ruling the plaintiff at once appealed to this court. Afterward, on further hearing, the court discharged the garnishee, and entered judgment against plaintiff for costs, and from such judgment plaintiff also appeals.

I. It is argued by appellant that as judgment had been entered against the garnishee and the record had been signed by the judge the trial court had no power or jurisdiction to set aside the entry and reopen the proceedings upon garnishee's motion. The position thus taken is untenable. The signing and approval of the record does not make the entry a finality. The court is given express authority by statute to change or expunge any order or ruling at any time during the term at which it was made. Code section 243. It may thus set aside a default or vacate a judgment upon cause shown or if satisfied that a mistake or wrong has been done may make such order upon its own motion. *Chapman v. Allen*, Morris 23; *Brace v. Grady*, 36 Iowa, 352; *Taylor v. Lusk*, 9 Iowa, 444; *Kirby v. Gates*, 71 Iowa, 100; *C. I. & D. R. R. v. Estes*, 71 Iowa, 603; *Wolmerstadt v. Jacobs*, 61 Iowa, 372. Appellant's argument, and the authorities cited by him, are based very largely upon the provisions of chapter one, title twenty, of the Code, concerning proceedings to reverse, vacate, and modify judgments. This chapter has no reference to cases like the one before us, where the application to set aside is made during the term at which the judgment is entered, but applies exclusively to proceedings instituted after the adjournment of such term. See Code, section 4091. We hold, therefore, the court had authority to entertain the motion.

II. The judgment against the garnishee was clearly erroneous, and the court could do no less than sustain the motion to set it aside. Before any judgment could be rightfully entered, proper notice must have been served on the judgment defendant Gleason. The only notice served in this case was made in another state, within less than twenty days before the term at which this judgment was taken, and under the law Gleason was not required to appear thereto until the

1. GARNISH-
MENT: set-
ting aside
judgment.

2. SAME: insuffi-
cient notice.

second term. Code, section 3517, subdivision 3. If not void for want of jurisdiction, the judgment was at least premature, and should have been set aside for that reason alone.

Moreover, on the facts disclosed by the garnishee's answers, the appellant was not entitled to judgment. He could not by garnishment get any higher or better right than Gleason, the execution defendant, himself at that time possessed. Jensen was under no obligation to pay any one until he received title to the land, and then his obligation was to the person to whom Gleason had transferred it. Appellant could rightfully enforce no claim against Jensen which would expose him to the liability of having to pay his debt twice. *Walters v. Ins. Co.*, 1 Iowa, 404.

It is said, however, that in his first answer Jensen clearly admitted the debt, and that judgment was taken upon such answer alone. We can only say that appellant is not in a position to claim an advantage from such fact. The second answer had in fact been taken at that time and was presumably a part of the record, for appellant himself sets it out in his abstract, although the bill of exceptions shows that its existence was not known to the trial court when the judgment was rendered. Whether the failure to disclose this second answer to the court was by design or oversight on part of plaintiff it is not necessary to decide for his right in the matter is governed by what the record in fact contained, rather than by such part of it as may have been specially called to the court's attention. The answers were there. They had reference to the same alleged debt owing to the same judgment debtor, and they could not be rightfully ignored. Had he been so advised, appellant could have taken issue upon these answers and required their truth or falsity to be judicially determined, but neither he nor the court could treat them as a nullity and proceed to judgment against

3. GARNISHEE:
judgment
against.

4. SAME.

him without a hearing. For this reason, also, the ruling of the trial court upon the motion to vacate the judgment must be approved. What we have here said sufficiently answers the further suggestion of appellant that, even if the entry of the judgment was irregular, there was no showing made in support of the motion that the garnishee had any defense to the claim made against him. It is certainly a good defense that the garnishee is in no manner indebted to the judgment debtor and such was the sum and substance of the showing made.

III. The foregoing discussion renders unnecessary any extended consideration of the appeal from the order discharging the garnishee. The liability of the garnishee cannot be presumed; it must be affirmatively shown. *Letts v. McMaster*, 83 Iowa, 449. To charge him upon his own answer, his liability must clearly appear, and if there be any reasonable doubt of such liability he should be discharged. *Morse v. Marshall*, 22 Iowa, 290; *Hibbard v. Everett*, 65 Iowa, 372. Not only is there an absence of that clear admission of liability which this rule demands, but its existence is clearly negatived. No issue having been taken upon these answers, the garnishee was entitled to his discharge. To the claim made that the garnishee is uniting with Gleason to defeat the collection of appellant's judgment, we can only say that no such issue has been presented.

The judgment of the district court is on both appeals,
AFFIRMED.

CLINTON L. NOURSE *et al.*, Appellants, v. CHARLES WEITZ
et al., Appellees.

Parties: In order to reach funds in the possession of a bank as a
1 depositary, the bank should be made a party to the suit.

Appeal Bond: RIGHTS OF OBLIGEE: SUBROGATION. Where the con-
2 ditions of a bond are broken, the money deposited by a prin-

principal to indemnify his sureties may be reached by the obligee through the equity of subrogation.

Appeal Bond: DEPOSIT TO SECURE SURETIES: HOW REACHED BY
3 **OBLIGEE.** A suit in equity against the principal and sureties on a supersedeas bond for damages sustained by reason of the appeal, to which a bank with whom the principal deposited funds to indemnify his sureties is made a party, is a proper proceeding to reach the funds in the bank, and the obligee is not required to resort to garnishment for that purpose.

Appeal Bond: WHAT SECURED THEREBY. A bond given to super-
4 sede the issuance of an execution on a judgment involving specific property, conditioned to pay costs and damages adjudged against appellant on appeal and to satisfy and perform a judgment rendered on appeal, does not include rents, damages, profits or taxes in relation to the property covered by the judgment which appellant has allowed to accumulate during the appeal.

Appeal Bond: REFORMATION OF. A supersedeas bond executed
5 through mistake may be reformed in equity.

Pleading: SUFFICIENCY OF. A pleading which contains allegations
6 of fact sufficient to entitle the pleader to the relief asked is not bad because it also states conclusions of law.

Appeal Bond: EXTENT OF REFORMATION. In the absence of evi-
7 dence as to agreed conditions in an appeal bond its reformation, if allowed, will be to conform it to the statute.

Appeal from Polk District Court.—HON. A. H. McVey,
Judge.

WEDNESDAY, MAY 27, 1903.

SUIT in equity to reach certain money in the hands of the German Savings Bank; to recover a judgment on a supersedeas bond in which John Collis was principal, and defendants Weitz and Wells were sureties; for subrogation to the rights of these sureties against the funds in the hands of the bank; and to reform the supersedeas bond. The trial court sustained a demurrer to the petition filed by the defendants, Weitz, Wells, and the German Savings Bank, and plaintiffs appeal.—*Reversed.*

C. C. & C. L. Nourse for appellants.

Brennan & Brennan for appellees.

DREMER, J.—From the petition we extract the following facts, which for the purposes of this appeal must be regarded as true: Plaintiff Nourse is the assignee of one Cox, who obtained judgment against John Collis for \$5,000. After that judgment was rendered, plaintiff therein brought suit, by creditors' bill, to subject certain property then in the name of strangers to the original litigation to the payment of this judgment. He succeeded in obtaining a decree to the effect that John Collis was the owner of the property, although standing in the name of others and awarding him a special execution for the sale of the property. The defendant in that action appealed, but plaintiff therein secured the issuance of an execution, and caused the same to be levied upon the property involved in the creditors' bill, whereupon John Collis, as principal, and defendants Weitz and Wells, as sureties, executed the following bond, which was filed with the clerk of the district court: "Know all men by these presents that we, John Collis as principal, and Chas. Weitz and L. J. Wells as sureties, are held and firmly bound unto Elmer Cox in the sum of twelve thousand and two hundred dollars, which sum, well and truly to be paid to the said Elmer Cox, his heirs, executors, and assigns, we hereby bind ourselves firmly by these presents. The condition of the above obligation is such that whereas the said John Collis and Mary Collis, defendants, and C. H. Martin, trustee and intervener, have appealed from the judgment or order of the district court of the state of Iowa, in and for Polk county, rendered on the 2d day of April, A. D. 1898, in an action then pending in said court, wherein the said Elmer Cox was plaintiff, and the said John Collis and others were defendants and interveners (being cause No. 6446,

equity, in said district court), to the Supreme Court of Iowa: Now, if the said appellant shall pay to the said appellee all costs and damages that shall be adjudged against the said appellant on said appeal, and shall satisfy or perform the said judgment or order which the Supreme Court may render, or order to be rendered by the said district court, then this obligation to be void; otherwise to be and to remain in full force and virtue. Witness our hands this 26th day of April, A. D. 1898. John Collis, Principal. Charles Weitz, L. J. Wells, Sureties." The special execution theretofore issued was thereupon recalled, and the case came to this court, where the decree was modified in some respects, and otherwise affirmed. See *Cox v. Collis*, 109 Iowa, 270. In order to save the sureties on this bond from harm, John Collis, in the name of William P. Collis, a brother, deposited with defendant bank the sum of \$5,500, which it is alleged was placed in the name of William P. in order to keep it from the creditors of John.

Plaintiff says that he has been deprived of the rents and profits of the property out of which he was kept by reason of the appeal; that, after selling the property to which he was found entitled by the decree of this court, there remained due him, for and on behalf of his assignor, the sum of \$1,700; that during the appeal defendant Collis collected the rents of the property, allowed the property involved in the creditors' bill to go to waste, permitted it to be sold for the taxes, and allowed the property to depreciate in value more than \$2,000, beside allowing taxes to the amount of \$1,000 to accumulate against it. The thirteenth paragraph of the petition reads as follows:

"(13) That it is now claimed by the said John Collis, and by the sureties upon said appeal bond, that the same is not in the form of a statutory supersedeas bond; that it does not indemnify the obligees against the depreciation in value of the said property, or against loss of rents or

deprivation of the possession of the said property during the said appeal; but plaintiff avers the fact to be that it was the intention and purpose of all the parties to the said bond, including the obligors, principal and sureties, as well as the obligees, that the said bond should supersede the said decree, and should stay execution, and should indemnify the obligees against any and all depreciation in the value of the said property, and against the loss of rents and profits during the said appeal, and against all damages to the property pending the said appeal, and against any and all loss to the obligees by reason of being deprived of the possession thereof, and that said bond was in fact used for said purposes, and for each of them, and if the said bond does not conform to the said intent, and does not cover said liability, and each and every part thereof, as above fully alleged, it is the result of mutual mistake of the obligors and obligees of the said bond, and plaintiffs are entitled to a reformation of the said bond, to the end that it may conform to the object, purposes, and intent of the parties thereto."

The prayer of the petition was that if the bond does not indemnify plaintiffs against loss by waste, deprivation of rents, depreciation in the value of the property, and other losses, it be reformed so as to meet the intent of the parties; that he have judgment on the bond for \$1,700, the amount still due; that the money deposited in the bank be decreed to be the property of John Collis, and be subjected to the payment of plaintiff's judgment, or that plaintiff be subrogated to the rights of the sureties in and to the said funds; and that he have any other relief to which he may, in equity, be entitled.

The demurrer was based on fourteen or more grounds, the principal ones of which were that the sureties have fully performed the condition of the bond; that they are not liable for waste, rents, profits, or depreciation in the value of the property pending the appeal; that the bond

did not lawfully supersede the decree appealed from, and cannot be enlarged or extended because the parties were mistaken as to its effect, because no reformation may be had of such an instrument, and, if permissible at all, the allegations of the petition are not sufficient to justify it, for that the allegation of mistake is a mere conclusion.

From what has been said, it is apparent that plaintiff is attempting to reach the funds in the hands of the German Savings Bank on two theories: First, that, although deposited in the name of William P. Collis, it in fact belongs to the defendant John Collis, and may be reached to pay plaintiff's judgment, whether the sureties have any right to it or not, for that, if they have no right, plaintiff is entitled to have the money subjected, and, if they have a right to its maintenance, it is for the reason that it was deposited to indemnify them on the bond; and, second, if there be liability on the bond, plaintiff is entitled to be subrogated to the sureties' rights in and to this fund. Plaintiff also seeks to recover damages on the bond for depreciation of the property, rent collected by Collis, waste during the appeal, nonpayment of taxes, etc.; and he also asks that, if the bond does not cover these matters, it be so reformed as to meet them, alleging that this was the intent of the parties.

It must be confessed that the petition is a sort of drag net, but, as defendants have not seen fit to attack it for this reason, we must treat the case from the different

aspects presented by the pleadings, which are
I. PARTIES: unassailed, except by the demurrer. The German Savings Bank joined in the demurrer. True, it is a mere depositary of the fund; but, in order that plaintiff may reach this fund, he was bound to make the bank a party. Is a cause of action stated against the bank? We think there can be no doubt on this proposition. It is either holding the money in the name of William P. for John Collis, or it is holding it to indemnify the sureties

on the bond given by John Collis. If the sureties are not liable on this bond for any of the damages claimed by plaintiff, or if the conditions of the bond have been fulfilled, then, of course, they are not entitled to the money, nor may they insist that it be held for their benefit. If, on the other hand, they are liable on this bond, then they

2. **APPEAL** stand as sureties, having indemnity furnished
bond: rights of obligee: subrogation. them by their principal, which the obligee or the creditor may reach through the equity of subrogation. These doctrines are very well understood, and are sustained by the unbroken voice of authority. Brandt on Suretyship (2d Ed.) volume 2, section 1419, and cases cited. So, no matter what the conclusion on the other branches of the case, the demurrer as to the German Savings Bank should have been overruled. The same ruling should have been made as to the other defendants, for the reason that they were proper parties to the suit, in so far as it was based on this theory. It is said that the

3. **APPEAL** bond: remedy against the bank was by garnishment,
deposit to secure sureties: how reached. but it is manifest that this would not have afforded complete relief, and it is doubtful if the equities of the various parties could have been determined in that character of proceeding. But however this may be, the remedy pursued in this case was at least cumulative, and plaintiff should not be compelled to resort to garnishment proceedings to work out his equities.

II. Coming now to the conditions of the bond, which was given in the proceedings to subject property, and not in the law action in which the original judgment was obtained, we find they were that appellants should pay

4. **APPEAL** bond: appellee all costs and damages that should
what secured thereby. be adjudged against appellants on the appeal (none were found); should satisfy and perform the judgment or order appealed from, in case it should be affirmed (this was done, by turning over the property for sale under the special execution), and any judgment or order which

the Supreme Court should render, or order to be rendered by the district court (this court made no order, except to modify the decree in favor of one of the appellants). Thus we see that the conditions of the bond do not cover waste, damages, profits, taxes, or any other matters for which plaintiff asks judgment. The principal and his sureties have complied with the terms of their obligation, and no recovery can be had against them on the bond. Plaintiff argues that they have not satisfied and performed the judgment, for the reason that the property has not been restored to him or his assignor in the condition which it was in when the original decree was rendered. But we find no condition in the bond which required them so to do. The property itself has been surrendered to plaintiff, and sequestered according to the decree of the district court, as modified by this court. This is all the bond provides for, and, the conditions thereof having been fulfilled, the sureties are not liable. That such a bond does not cover rents, waste, depreciation in value, or any of the other matters which plaintiff seeks to recover, see *Gill v. Sullivan*, 62 Iowa, 529; *Sumrall v. Reid*, 32 Ky. 65; *Watkins v. Suter*, 11 Ky. Law Rep. 762; *Lyons v. Lancaster*, 12 Ky. 434 (33 S. W. Rep. 838); *Kennedy v. Nims*, 52 Mich. 153 (17 N. W. Rep. 735); *Hutton v. Lockridge*, 27 W. Va. 428; *Wardlow v. Steele*, 47 Tenn. 573; *Jane v. Drorbaugh*, 63 Iowa, 711; *Malone v. McClain* 3 Ind. 582; *Bush v. Fetrow*, Wils. 387; *Opp v. Ten Eyck*, 99 Ind. 345; *Boulden v. Organ Co.*, 92 Ala. 182 (9 South. Rep. 283).

Claim is made by appellees that the bond was not approved by the clerk. This we regard as wholly immaterial, so far as it relates to the matter now under consideration. The bond in fact operated as a stay, and, even if it did not contain the statutory conditions, it was valid as a common-law obligation.

While not heretofore distinctly stated, it will be observed that one condition required by statute was omitted

from the bond. This was that appellant should pay all rents of or damages to the property during the pendency of the appeal, out of the possession of which appellee was kept by reason of the appeal. Code, section 4128. This omission has an important bearing in determining the liability of the sureties on the bond.

One other suggestion may not be out of place, with reference to Collis' failure to pay taxes and other charges against the property. There can be no doubt, we think, that plaintiff or his assignor, in virtue of his decree, might have paid these exactions. They became charges against the property, no matter who finally secured it, and plaintiff has not been damaged because Collis failed to pay them. Surely the sureties on the appeal bond are not liable therefor.

III. We have then but two questions remaining: First, may a supersedeas bond be reformed in equity? And, second, if it may, are the allegations in plaintiff's

5. APPEAL bond
reformation
of.

petition sufficient to justify such reformation? While much doubt has been expressed regarding the power of a court of equity to reform a supersedeas or other bond given in a judicial proceeding, this court is committed to the doctrine that such bonds may be reformed in the event a mistake has been made in their execution. *Foley v. Hamilton*, 89 Iowa, 686. Were the question *res integra*, the writer would entertain grave doubts of the right of a court of equity to correct such an instrument. But the case just referred to has support in other jurisdictions, and should be adhered to. See *Neininger v. State*, 50 Ohio St. 394 (34 N. E. Rep. 633, 40 Am. St. Rep. 674); *State v. Franks*, 51 Mo. 98; *Smith v. Allen*, 1 N. J. Eq. 43 (21 Am. Dec. 33); *Clute v. Knies*, 102 N. Y. 377 (7 N. E. Rep. 181).

Does the pleading recite such facts as would justify a court of equity in reforming the instrument as against the sureties? The paragraph of the petition which we

have quoted may be said to contain statements of general conclusions, but there are also allegations of fact which, taken with the other statements in the petition, are sufficient, in our judgment, to make out a case for reformation. There may be some difficulty in making proof of these averments, but that is no reason for sustaining the demurrer; and it may be that, with the bond reformed, plaintiff will not be entitled to recover the damages claimed by him, but as that question does not seem to have been raised by the demurrer, and is not argued, we do not care to make any pronouncement thereon.

We take it that, if reformation is had at all, it will go no farther than to make the instrument a complete statutory bond, although the parties may, of course, have the obligations reformed to express the real content of reformation. tract, whatever it may have been. In the absence of evidence of an express agreement between them as to the conditions of the bond, the extent of the reformation, if granted, will be as already indicated.

Having now fully indicated our views on all the questions presented, the result of our conclusions is manifest. The trial court should have overruled the demurrer, and, as it failed to do so, its order is REVERSED.

BISHOP, C. J., taking no part.

ELLEN SLATTERY, Appellee, v. LIZZIE SLATTERY, *et al*,
Appellants.

Deeds: EXECUTION: EVIDENCE. In an action for the possession of real property which plaintiff claimed by deed from her children, the evidence is considered and held sufficient to show that plaintiff's son, the deceased husband of defendant, joined in the deed.

Evidence: MOTION TO STRIKE. Where evidence is admitted without objection, a motion at the close of all the testimony to strike certain portions comes too late.

Deed: ALTERATION OF. The unauthorized alteration of a deed
8 after its execution and delivery will not affect its validity.

Deed: ACKNOWLEDGMENT. Acknowledgment is not necessary to
4 the validity of a deed between the parties..

Adverse Possession: PAYMENT OF RENT. Payment of rent for a
5 series of years by the occupant of land will preclude his heir
from acquiring title by adverse possession.

Appeal from Lee District Court.—HON. H. BANK, Judge.

WEDNESDAY, MAY 27, 1903.

ACTION to recover possession of real estate and for rents and profits thereof. The action was commenced at law, but was transferred to the equity docket, and tried as an equitable action. It appears without question that Daniel Slattery, Sr., died intestate in the year 1835; that he left surviving him this plaintiff, as his widow, and three children—two sons, Charles and Daniel, Jr., and one daughter, Catharine; that at the time of his death he was the owner, among other tracts of land, of the land in controversy, which was the family homestead, and is described as the east half of the southwest quarter of section 8, township 66, range 5, Lee county. It is the contention of plaintiff that on March 13, 1886, she and her three children above named entered into an agreement in writing in substance waiving administration and providing for an amicable division and partition of the estate of the deceased husband and father; that by such writing the details respecting the distribution of the personal property are set forth, and reference is made to the fact that the real estate has been partitioned by appropriate deeds executed and delivered. Plaintiff further contends that pursuant to said agreement there was conveyed to her the fee title to the homestead, being the lands here in controversy, by her said children, including Daniel, Jr., and that by separate deeds the remaining lands forming part of the estate were conveyed one part to Daniel, Jr., and

one part to Catharine. Plaintiff also says that on the same day she executed and delivered to Daniel, Jr., a deed of the lands here in controversy, conveying to him the fee title thereto, but reserving to herself, however, the right of possession and the rents and profits of said lands for the period of her natural life. The facts thus contended for by plaintiff are not disputed by defendants, save and except that it is denied that Daniel, Jr., joined in the execution and delivery of the written contract and the deed to plaintiff as alleged. The following undisputed facts also appear: That, following the transactions above referred to, plaintiff and her son Daniel, Jr., who at the time was unmarried, lived together upon the land in controversy, and that an accounting for rent was made each year to plaintiff by her said son; that matters thus continued until January, 1897, when Daniel, Jr., died, leaving surviving him the defendant Lizzie Slattery, whom he had married in the meantime, as his widow, and one minor son, Charles M. The latter died in March, 1899, before the commencement of this action. After the death of Daniel, Jr., the defendant, his widow, continued to occupy the lands, and when this controversy arose was in possession thereof through the defendant Carr as her tenant. After the death of her son, plaintiff went to live with her daughter, Catharine. This action was brought because of the alleged refusal of defendants to recognize the rights of plaintiff in and to said lands as claimed by her, said plaintiff, both as to possession and payment of rent. In one division of her answer defendant Lizzie Slattery pleads adverse possession under claim of right, by herself and her husband, for more than ten years, and that all right of plaintiff is barred by the statute of limitations. In another division she claims to be the absolute owner of one-third of the land, and that she owns the other two-thirds subject to a life estate or homestead right on the part of plaintiff, and this she claims under the deed of Charles and Catharine.

ine to plaintiff and the deed of plaintiff to her deceased husband, being the deeds hereinbefore referred to. As already stated, however, she denies that such deed to plaintiff was either executed or delivered by her husband, Daniel, Jr. Further, by her answer the value of the rents and profits is put in issue. Said defendant also files a cross-petition, in which she asks that her title to an undivided one-third of said lands be quieted in her, and that plaintiff be decreed to have no interest whatever therein. There was a decree in favor of plaintiff for the possession of the entire tract of land, and as against defendant Lizzie Slattery for the sum of \$675, being the value as found, of the rents and profits withheld by her. Defendants appeal.—*Affirmed.*

J. F. Smith and B. A. Dolan for appellants.

James C. Davis and J. E. Craig for appellee.

BISHOP, C. J.—The initial question presented by the record is whether or not Daniel Slattery, Jr., joined in the execution and delivery of the deed to the lands in controversy to his mother, as alleged by her. It is manifest that the answer to such question must be determinative of the principal issue in the case. Indeed, counsel for appellants do not deny that, if such question shall be determined in accordance with the contention of appellee, then no other questions remain for consideration, save that made by the plea of the statute of limitations, and that respecting the value of the withheld rents and profits. From our reading of the record we think but one answer can be made to such initial question; that is, that Daniel Slattery, Jr., was a party, with his mother, brother, and sister, to the agreement for the disposition of the estate of his deceased father; that he signed the written agreement to which we have made reference, and joined in the execution and delivery of the deed to plaintiff upon which she bases her right to recover in this action.

1. DEEDS: execution: evidence.

The conclusions thus reached by us are based upon evidence found in the record, and the truth of which is in no manner challenged. William Seeper, husband of Catharine, as a witness testifies that Daniel, J., was present and took part in the negotiations at the time the terms of settlement were agreed upon, and that this occurred at the place where the mother was then living. He also testifies that all the parties then went to a bank to have the papers drawn up. We quote from his testimony: "The heirs met together, and a settlement and adjustment of his estate was made. I was present, and the settlement was at the home of the old lady, but it was finally settled and all the papers signed at the savings bank—Mr. Johnston's bank—who sort of conducted it for us. Was present when this deed you hand me was signed at the bank." The deed referred to is the one to plaintiff upon which this action is predicated. Again, the same witness says: "This paper [the deed] was signed in the bank on the same day and at the same time. After these papers were signed, Judge Johnston gave this contract to the old lady, and told her to take care of it, and then he said to the old lady: 'Here is your deed, and here is the contract. You are the proper one to take care of it.' The other deeds were delivered at the same time, one to my wife, and one to Daniel, Jr." Upon cross-examination the witness gives in detail the circumstances attending the execution and delivery of the contract and deed. The testimony of said witness is corroborated in many particulars by testimony given by his wife, Catharine, and by Charles Slattery.

It is true that to many of the interrogatories propounded to these witnesses the defendants made objection, based upon section 4604 of the Code. That section provides, in substance, that no person interested in the event of an action, and no husband or wife of any such person, shall be examined as a witness in regard to any personal

transaction or communication between such witness and a person at the commencement of such examination deceased, against the heir at law, next of kin, or survivor of such deceased person. It is not claimed that any of the witnesses referred to either have or claims to have any right, title, or interest in or to the lands in controversy, or to the rents and profits thereof. But it is said that the matter of the execution of the deed to plaintiff, as alleged, involved a personal transaction with Daniel, Jr., now deceased, and that said witnesses are interested in the event of this action, in that a failure on the part of plaintiff to recover herein would subject them to an action in damages at the hands of plaintiff for breach of warranty, it appearing that the deed contains covenant of warranty in the usual form. The witnesses named were the only ones called on behalf of plaintiff to establish the fact of the execution and delivery of the contract and deed; and, to defeat a recovery by plaintiff, counsel for defendants seem to place reliance wholly upon faith that the objections made must be sustained, and that such ruling would result in stripping the record bare of all evidence tending to establish the fact in question as to the execution and delivery of the contract and deed. But such assumption is not well founded, and, as we read the record, it is unnecessary that we even decide the question raised by the objections so made. The specific questions propounded to the witness, and to which objections were made, had relation to the execution and delivery of the papers, including the contract and deed to plaintiff. For the purposes of the case we may concede that the particular questions as against which objection was urged and the answers to such questions, should be ruled out. Still it appears that the witnesses were allowed without objection to answer questions propounded to them having reference to the subject of the execution and delivery of the contract and deed, and which answers, in our view, fully establish the

facts thus in dispute. This being true, it seems to us that we have an end of the controversy, and that any consideration of the objections made is wholly unnecessary.

In saying this we do not overlook the fact that at the close of the evidence defendants moved to strike all the testimony of the witnesses having reference to the execution and delivery of the contract and deed as incompetent under the statute. Such objection came too late. The effect of the statute is to make the witness incompetent to testify. There is no provision holding that the evidence of such witness is not competent if admitted without objection made at the time when offered. A general objection to the competency of a witness, made at the close of his evidence, comes too late. *Watson v. Riskamire*, 45 Iowa, 281.

Some claim is made because of the fact that the deed, as now presented, appears to have been altered, the signature of Daniel, Jr., having been erased, or rather crossed out, by pen and ink, and all reference to him having been in like manner stricken from the acknowledgment. It clearly appears, however, that this was done after the delivery of such deed, and therefore its validity as an instrument of conveyance cannot be affected thereby. Without doubt, where an instrument has been signed and delivered, the title passes, and such title cannot be affected by a subsequent alteration of the instrument not shown to have been specially authorized. *Hollingsworth v. Holbrook*, 80 Iowa, 154; *Woods v. Hilderbrand*, 46 Mo. 284 (2 Am. Rep. 513); 5 Am. & Eng. Ency. Law (1st Ed.) 425.

Under the circumstances of this case an acknowledgment of the deed was not necessary to its validity. "It is well settled that an acknowledgment is not essential to a deed of conveyance. If it is in fact executed and delivered voluntarily, it will be effectual as between the parties to it and all parties hav-

2. EVIDENCE:
motion to
strike.

3. DEED: alter-
ation of.

4. DEED: ack-
nowledg-
ment.

ing notice of it." *Kruger v. Walker*, 34 Iowa, 511. Defendant Lizzie Slattery neither had nor claims any right in the property, save and except as the widow of Daniel, Jr. Accordingly her rights must be measured by the rights possessed by her husband at the time of his death, and not otherwise. This is elementary.

Such being the condition of the record, we have no hesitancy in holding that plaintiff acquired full title to the lands in question by virtue of the settlement contract and deed. This being true, it follows that she has fully established her right to the possession of the property and to recover the rents and profits thereof, unless such right has been cut off by operation of the statute of limitations. That the plea of the statute is without force clearly appears from our reading of the evidence, and all contention arising out of the subject may be disposed of in a word.

5. **ADVERSE possession: payment of rent.** During all the years of his occupancy of the property Daniel, Jr., paid an annual rental to his mother, and it is only during the brief period since his death that the right of plaintiff has been made the subject of any question. Indeed, in every material sense this is admitted by the defendant. In our view, the evidence fully justifies the finding of the trial court in respect to the value of the withheld rents and profits.

We conclude that there was no error in the decree, and it is **AFFIRMED**.

CEDAR RAPIDS CANNING COMPANY, Appellant, v. THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY.

Railroads: RIGHT OF WAY: PRESUMPTION AS TO WIDTH: EVIDENCE.

In the absence of proof to the contrary a railway company will be presumed to have appropriated a right of way of the maximum statutory width, but this presumption simply casts the burden on one asserting the contrary and may be overcome by evidence rebutting the inference.

Appeal from Linn District Court.—HON. W. N. TREICHLER,
Judge.

WEDNESDAY, MAY 27, 1903.

ACTION to quiet title to a strip of land. Defendant claimed it as a part of its right of way. On hearing, the petition was dismissed, and plaintiff appeals.—*Reversed.*

Redmond & Stewart for appellant.

J. C. Leonard, S. K. Tracy, Carroll Wright and John I. Dille for appellee.

LADD, J.—This is a controversy concerning a strip of land about twenty feet wide and two hundred feet long. It is either a part of defendant's right of way, or of land fenced in by plaintiff. The defendant's railroad was built in 1871. In October, 1872, one Hull conveyed the adjacent land to the Star Wagon Company. This land was measured and staked out, and, as described in the deed, extended to within about thirty feet east from the center of defendant's main track, though the west boundary was mentioned as the right of way. The plaintiff claims under the wagon company, through mesne conveyances, with practically the same descriptions. In the summer of 1874 the wagon company erected a tight board fence, eight feet high, on the line supposed by it to be the boundary between the land purchased from Hull and the right of way; the same being a part of the inclosure about all its ground and works. This remained until about three years before the trial, when it was replaced by a new one of like description. In April, 1901, plaintiff was about to construct a warehouse near the fence, when it was advised that the defendant claimed that its right of way extended fifty feet from the center of the main track, as originally located; and on the same night a side track farther east on plaintiff's premises was removed to the disputed strip, and covered with cars. The only evidence of title introduced

by defendant was a deed dated February 11, 1874, from Hull to defendant's predecessor, of "a strip of land fifty feet in width on each side of the center line of said railroad as now definitely located over and across that part of the tract of land conveyed by Myron L. Pardee, executor of L. B. Crocker and John Bertram, to said Hull," and another from John Bertram to Hull, dated December 26, 1872, describing land including this, "except that the Chicago & Northwestern Railway Company and the Burlington, Cedar Rapids & Minnesota Railway Company have each the right to use for a right of way that portion of the above granted and described premises now so used and occupied by them respectively."

Neither party traces its title back to the government, but appellant opens its argument by saying: "The facts in this case are that prior to 1872 one Bertram and others owned the land in controversy—a strip about twenty feet wide and about two hundred feet long. A sale of this property, together with land and lots east and west of it and north and south of it, also, was made by the owners about this date to O. N. Hull, now deceased; and Hull became the owner of the fee over which the railroad track referred to in the evidence as the original main line of the B. O. R. & N. ran; also of the land over which the C. & N. W. Ry. track was laid. Being the owner of all, negotiations were opened between Hull and the Star Wagon Company, then located further north, to sell a site south of what is now Twelfth avenue, formerly Shearer street, and east of the B., C. R. & N. tracks." From this admission it is to be inferred, in defendant's favor, that its road was laid across a body of land owned by Bertram and others, subsequently conveyed to Hull. The validity of its claim to a right of way is not put in issue. The only controversy is as to whether such way extends fifty feet east of the center of the main track, as originally located, or but thirty feet, to the fence.

The defendant insists that, from the laying of its track and operation of the road, the presumption arises that it acquired a right of way of the maximum statutory width, of one hundred feet. It cites *Drake v. Ry.*, 63 Iowa, 302, but, while the easement was there presumed, its width is not mentioned. In *Campbell v. Ry.*, 110 Ind 490 (11 N. E. Rep. 482), the father of the plaintiff had permitted defendant to lay its track through his farm in 1868, and to occupy and improve the right of way until 1881, when the son brought action for possession; and it was held that as the company had entered the land with the license and consent of the father, under whom the plaintiff claimed, and expended its money on the faith of such license, a right of way was acquired, in the absence of any limitations thereon, to the full statutory width. But the right to any way, rather than that of a particular breadth, was in issue. In *Prather v. Western Union Tel. Co.*, 89 Ind. 501, the railroad was constructed across plaintiff's farm, and he neglected to claim damages within the statutory period. The telegraph company, by permission of the railroad company, and on condition that the latter might use one wire, placed its poles twenty-nine feet from the center of the track; and the court held, in an action against it for trespass, that, in the absence of any record evidence of the width of the right of way, it would be presumed to be sixty feet, as authorized by statute. In *Jones v. Ry.*, 144 Pa. 629 (23 Atl. Rep. 251), the track appears to have been constructed in the street within thirty feet of plaintiff's lot, and he asked damages. The court held that, in the absence of proof to the contrary, the company will be presumed to intend to appropriate all the statute will allow, saying: "The lines of a street on which a railroad company locates the center line of its road and lays its tracks are not necessarily, nor presumed to be, the boundaries of its right of way. These may be within, beyond, or upon the lines of the street, but in either case it

is the duty of the company to designate them by some appropriate and decisive act. A company which refuses, when requested by the lot owner, to define its right of way by marking the outside lines, may be expected, when its necessities or interests require it, to claim an appropriation of the full width of sixty feet, and to invoke the presumption already mentioned in support of the claim."

It is clear from these decisions that defendant's predecessor must be presumed to have acquired a right of way one hundred feet wide, in establishing the road. That was prior to the conveyance by Hull to the wagon company. The tract of land owned by him was servient to the easement of the railroad company, and, of course, he could not deprive it of any part of the right of way by sale to others. But a railroad company is not bound to acquire a right of way of any particular width, nor to lay its main track in the center of that which is acquired. While ordinarily it is to be presumed to have obtained a way of the maximum width, and to have intended to have its track in the center, this is merely a naked assumption, casting the burden of proof on any one asserting the contrary, and may be overcome by evidence rebutting the inference. As to width, this must necessarily be so, for ordinarily a small portion of the right of way is at first made use of, and the remainder only as necessity demands. Hence actual possession of the portion of the way farthest from the track is seldom taken prior to the construction of fences. But this very fact should make courts cautious in fixing such boundaries, and exact satisfactory proof in order to defeat the assumption. The right of way immediately north of this is but sixty feet wide. The precise width of that to the south is not disclosed, but seems to be somewhat less than one hundred feet. This fence was placed on what the wagon company supposed to be the boundary line in 1874, within three years of the laying of the track. It was a part of the inclosure of its entire

grounds. It was such a structure as usually marks a division line, and of its location and the occupancy of the disputed strip the defendant was charged with notice. The continuance of this fence and the occupancy of the land up to it for more than twenty-five years, without any objection on part of defendant, we think sufficient to overcome the presumption that the railroad had acquired an easement in a strip of land fifty feet wide east of the center of its main track, and leads to the conclusion that it had either obtained a right of way less than one hundred feet in width, or else that the greater part lies west of the center of the track. In *Barlow v. Ry.*, 29 Iowa, 276, and *Slocumb v. Ry.*, 57 Iowa, 675, the extent of the right of way was fixed. Here the disputed land had been conveyed by Hull to the wagon company, and the defendant necessarily relies solely on the presumption arising from the location of its tracks.—REVERSED.

DRUCILLA DUNNING, Appellee, v. E. A. BAILY, Garnishee,
Appellant at Suit of Plaintiff, v. S. C. BAILY *et al.*,
Defendants.

Garnishment: FRAUDULENT CONCEALMENT OF PROPERTY: EVIDENCE.

- 1 The evidence in a garnishment proceeding of the wife as having in her possession moneys and credits belonging to the judgment defendant, her husband, considered, and held to show that the notes in the hands of the garnishee were the property of defendant and subject to garnishment.

120 729/
1129 396.

Same: GIFTS. Where the wife, a garnishee under a judgment

- 2 against the husband, expressly denied in a former suit ever owning any notes given her by her son, and there was evidence that the notes were the property of the husband, the wife cannot defeat the garnishment on the ground that the transaction amounted to a gift from defendant either to her or the son; and this is especially true when first suggested on appeal.

Garnishment: PROPERTY OF HUSBAND IN WIFE'S NAME: INSTRUCTION.

- 3 Where the wife is garnished as the supposed debtor of the husband, an instruction that if the garnishee had no property

of her own, and property which originally belonged to her husband and in his name was transferred to his son and that such property, or a note given therefor, was taken in the name of the garnishee, for which she gave no consideration, the same was liable for her husband's debts, was proper.

Fraud: EVIDENCE: INSTRUCTION. Where it is claimed that property sought to be reached by garnishment was transferred by the judgment debtor to his wife in fraud of creditors and there is evidence of a conveyance of real property from a son to the wife at about the same time, an instruction permitting the jury to consider the same as bearing on the good faith of the transfer to the wife is proper.

Exoneration of Garnishee. Where a garnishee after notice treats property of the judgment debtor in his hands as his own, he is not entitled to a discharge on offering to deliver the property but is liable to a judgment for the value of the property in his hands.

Appeal from Jones District Court.—HON. H. M. REMLEY, Judge.

WEDNESDAY, MAY 27, 1903.

GARNISHMENT proceedings against E. A. Bailey, who was garnished as having in her possession moneys, credits, and other property belonging to the judgment defendant, S. C. Bailey, her husband. On trial to a jury, a verdict was returned finding that E. A. Bailey held such property, and judgment was rendered against her for the amount of plaintiff's judgment against defendant S. C. Bailey, with costs. The garnishee appeals.—AFFIRMED.

F. L. Anderson for appellant.

Ellison & Ercanbrack and *Voris & Haas* for appellee.

DEEMER, J.—At the time the garnishment was served plaintiff held a judgment against S. C. Bailey for something more than \$200 and costs. He caused execution to issue on said judgment, and E. A. Bailey, the wife of the judgment defendant, was garnished thereunder. The

garnishee denied having or holding any money, credits, or property of any kind belonging to the judgment defendant. Plaintiff filed a pleading controverting this answer, and on the issue thus joined the matter was submitted to a jury, with the result above indicated.

The evidence shows that, at the time she was garnished, the garnishee held a note for the sum of \$1,075, executed by D. S. Bailey and Cora Bailey on May 24, 1901. This was given in lieu of another note for the sum of \$1,200 executed by the same parties on May 24, 1899. Plaintiff claims that, while these notes were made payable to E. A. Bailey, they in fact belonged to her husband, S. C. Bailey, and the case was submitted to the jury on this issue. The garnishee offered no evidence, and the case was submitted on that produced by plaintiff.

We have then to determine, first, whether or not the verdict has support in the evidence. Under such circumstances, plaintiff is entitled to rely not only on the direct evidence in his favor, but on all reasonable and proper inferences therefrom. The evidence shows

1. GARNISH-
MENT: fraud-
ulent con-
cealment of
property:
evidence.

that the garnishee on the 27th day of December, 1900, in the trial of an action in the district court of Linn county between one Bolton and this garnishee, testified that she had no money or notes of any kind, and that she owned no notes given to her by her sons (the makers of the \$1,075 note are garnishee's sons); that all her money was invested in a homestead in the town of Marion. She produced on this trial the \$1,075 note, in response to a subpoena, and this note was introduced in evidence. At the same time she admitted that this note was given her in lieu of one for \$1,200 or \$1,250 given her by the same parties on May 24, 1899. It also appeared that S. C. Bailey at one time did some business with the Farmers' & Merchants' Bank of Marion. It further appears that some certificates of deposit were at one time issued by this bank to D. S.

Bailey, son of S. C. and E. A. Bailey, for money deposited by S. C. Bailey; that these certificates were on May 23, 1899, canceled, and new ones issued for the same amounts in the name of E. A. Bailey. On May 24, 1899 (it being the date of the original note to E. A. Bailey), these certificates of deposit which had been issued to her were returned. They were indorsed, "E. A. Bailey and D. S. Bailey." There is also evidence from which a jury may have found that the deposit was made in the bank originally by S. C. Bailey. From this evidence a jury may well have found that the whole transaction was a cover to conceal S. C. Bailey's property, and that the note for \$1,075, as well as the other notes, belonged to him. There was no pretense that the garnishee ever in fact deposited any money with the bank, and nothing but the fact that the certificates at one time stood in the name of D. S. Bailey to indicate that he ever had any ownership of them. But the jury was warranted in finding from the evidence we have recited, and especially the dates of the various transactions, that the note of which the \$1,075 one is a renewal was given for the certificate of deposit, which at one time was in his name, and was by him transferred to his mother. As the garnishee held the original note in her possession when the garnishment was served, and as she produced upon the trial the \$1,075 one, which was made payable to her, there was sufficient evidence, we think, to justify the conclusion that the notes belonged in fact to the judgment defendant, and were subject to garnishment in the hands of E. A. Bailey.

It is said there was no evidence of the debtor's insolvency, and that as the transaction may have amounted to a gift from father to son, or from husband to wife, plaintiff could not recover without such evidence. If
2. SAME: gifts. there were any basis in fact for these claims, the point would be well taken, but there is not. The garnishee explicitly denied ever owning the notes or the

certificates of deposit. If the certificates were given to the son, we should hardly be expected to see him making notes to his mother for the amount thereof. Moreover, this question does not seem to have been presented to the trial court. It is raised for the first time here, and for that reason alone we should not consider it.

Further, it is argued that the garnishee is not shown to have had possession of the notes or the certificates. There was enough evidence to take the case to the jury on these propositions.

II. Certain instructions are complained of. The assignments of error are not sufficient to present the questions argued. *Fitch v. Traction Co.*, 116 Iowa, 716. But

3. GARNISH-
MENT: prop-
erty of hus-
band in wife's
name. if they were, we find no such errors as the garnishee complains of. The two principal ones were as follows: "(4) If you find from

the evidence that the defendant did not have any property of her own, and that property which was originally owned by S. C. Bailey, and was in his name, was transferred to the name of D. S. Bailey, a son of E. A. Bailey, and that said money, or a note given therefor, was taken in her name, and that the said E. A. Bailey gave no consideration for said transfer, then, as between the plaintiff and E. A. Bailey, the same would be, in law, the property of S. C. Bailey, and would be liable to the payment of his debts, and your verdict would then be in favor of the plaintiff. (5) Fraud is not presumed, but must be shown by the evidence. In determining whether or not the transactions between the said S. C. Bailey and D. S. Bailey and the defendant E. A. Bailey were in good faith, you may consider the relations between the parties, and you should scan the transfer of property between husband and wife and children carefully, when the rights of creditors are concerned; and you can consider whether or not the defendant explained the transaction, as to their good faith, when she had an opportunity, as a circumstance bear-

ing upon the question of good faith." There was no error, under the issues, in either of them. *Corn Exchange Bank v. Applegate*, 91 Iowa, 411; *Glenn v. Glenn*, 17 Iowa, 498.

Evidence as to a transfer of real property from the son to the mother was received without objection. The court instructed that the jury might consider this circumstance ^{4. FRAUD; evidence: instruction.} on the question of good faith. This was eminently proper. As the conveyance was made about the same time as the other transactions between the parties, and in view of the fact that no objection was offered to the evidence, and the further fact that it seems, in a measure, at least, to be connected with the transactions relating to the notes and the certificates of deposit, there was no error. We have already observed that there was neither pleading nor proof of an advancement or gift from parent to child, or from husband to wife; hence there was no necessity for instructing as to either of these matters.

III. Code, section 3946, provides, in substance, that a plaintiff in garnishment may have a judgment against the garnishee for the delivery to the sheriff of any property in the garnishee's hands belonging to the defendant, within a time to be fixed by the court, and for the value of the same as fixed in said judgment, if not delivered within the time fixed, unless before such judgment is executed the garnishee has delivered to the sheriff such property. Section 3944 provides that a garnishee may, at any time after answer, exonerate himself from further responsibility by placing at the sheriff's disposal the property of the defendant. The jury rendered a verdict for plaintiff for the amount of his judgment against S. C. Bailey. Defendant filed a motion for a new trial, and, subject thereto, offered to deliver to the court or to the sheriff the \$1,075 note, and asked to be relieved from all further responsibility as garnishee. The motion was overruled, and an unconditional judgment was

5. EXONERATION of garnishee.

rendered against the garnishee for the amount of the verdict. This is complained of, and the statutes to which we have referred are relied upon for a reversal of the judgment, or a modification of the order. But for the fact that the garnishee, after notice was served upon her, undertook to deal with the property then held by her as her own, and substituted the \$1,075 note for the one executed May 24, 1899, we should be inclined to agree with counsel in some of their contentions. It was the garnishee's duty to hold the property in the condition it was in when she was garnished. Having failed to do so, she was guilty of a conversion thereof, and judgment against her for the amount of plaintiff's claim was correct. *Ry. Co. v. Hall*, 37 Iowa, 620; *Thayer v. Partridge*, 47 Vt. 423; *Citizens' Bank v. Fuel Co.*, 89 Iowa, 618. Through the conversion of the property, the garnishee became liable to plaintiff, and there was no error in the judgment. *Liddle v. Allen*, 90 Iowa, 738. The garnishee did not offer to surrender the property which was in her possession at the time of the garnishment. This she could not do, because she had converted it.

There is no error in the record, and the judgment is therefore **AFFIRMED**.

PHEBE LUCAS, Appellee, v. JAMES WHITE, Appellant.

Dower: LIMITATION OF ACTION. The statute of limitations does not commence to run against a wife's right of dower until the death of the husband.

Appeal from Muscatine District Court.—HON. J. W. BOILINGER AND HON. P. B. WOLFE, Judges.

WEDNESDAY, MAY 27, 1903.

THE opinion states the case.—*Affirmed*.

Jayne & Hoffman for appellant.

O. A. Byington and *Titus & Jackson* for appellee.

120	735
121	258
120	735
130	509
120	735
132	438
130	735
137	171
137	172
120	735
139	683
142	361

WEAVER, J.—Plaintiff married Edward W. Lucas, in December, 1852, and said marriage relation continued until the death of the husband in the year 1900. In the year 1853 Edward W. Lucas and Gilman Folsom together obtained title from the United States to the northwest quarter of the southeast quarter and the south one acre of the southeast quarter of the southwest quarter of section 18, township 78 north, of range 3 west, in Muscatine county, each of the said parties being vested with an undivided half in said lands. The plaintiff never conveyed away or joined in any deed relinquishing her inchoate right in said property, and upon the death of her husband brought this action to have admeasured and set apart to her, as the widow of the said Edward W. Lucas, the one-third in value of the one-half of said lands. The defendant resists her claim, denying her right to the relief sought, and alleges title in himself by deed made by one Null to Hezekiah Pray in the year 1855, and from Pray through several intermediate grantees to himself. He further alleges continuous, adverse possession in himself and his said grantors during all said period from 1855 to the present time, and that plaintiff's right of action is barred by the statute of limitations. This issue of the statute of limitations, which was determined by the trial court upon demurrer adversely to the defendant, is the only question presented in argument.

The statute provides, in effect, that the time limitation upon the right of action begins to run from the time when the "cause" thereof accrues. Code, section 3447. If, then, plaintiff's cause of action accrued to her when the alleged adverse possession was initiated in the year 1855, her action is manifestly barred; but, if the cause accrued only upon the death of her husband in the year 1900, it is equally manifest that the bar has not arisen and the judgment of the district court is right. The action is brought, as we have seen, to enforce a right which could mature only upon the death of the husband. During his

lifetime the right was inchoate only, and would die with the wife, if she did not outlive him. In the very nature of things, there could be no admeasurement of common-law dower or statutory distributive share in the husband's estate during his lifetime, and, such being the case, it appears clear that the statute has not run against plaintiff's demand. It is urged, however, that the courts recognize the inchoate right of the wife in her husband's lands as having the elements of property, and actions have been upheld for its protection, even in the lifetime of the husband. From this premise the conclusion is drawn that, as plaintiff sought no such remedy or protection during the long period between the years 1855 and 1900, she is barred from now asserting her claim. We think that it will be difficult to find any well-considered decision supporting this contention. The cases cited—*Buzick v. Buzick*, 44 Iowa, 259, and *Madigan v. Walsh*, 22 Wis. 501, and others of that class—do not go to the extent claimed for them.

The utmost of these holdings is that where, by some fraud or mistake, the title of the husband has been so divested as to apparently divest the wife's interest also, she may maintain an action, not to recover the property or to set apart any share therein, but to remove the cloud upon her inchoate right. For example, in the *Buzick Case* the husband, in collusion with his son, permitted the latter to obtain a sheriff's deed to the former's property in order to defraud the wife, while in the *Madigan Case* the wife had been induced by fraud to execute a deed relinquishing her right. It may well be that where, by fraud or mistake, the wife's inchoate interest has been apparently extinguished or released, if she permits the record to remain in that condition without some action to cure it, the statute of limitations will run against her even in the husband's lifetime; but this we are not now required to

decide. It is an altogether different proposition to say that when, by the misfortune, neglect, or thriftlessness of the husband, a third party succeeds in acquiring title by adverse possession against him, the loss of the husband's ownership works an extinguishment of the wife's contingent interest. The only case in which we have touched directly upon this question is *Hurleman v. Hazlett*, 55 Iowa, 256. In that controversy, a wife, being the owner of land, conveyed it by deed in which the husband did not join. After more than ten years the purchaser brought action to quiet his title against the husband (who was still living), alleging adverse possession as the ground for relief, and we held in clear and explicit language that the husband's right "cannot be so barred." The principle there recognized seems equally applicable to the present appeal. Such, indeed, is the almost universal holding of the courts of other states. The decisions very generally are to the effect that, as the wife's right in her husband's land during his lifetime is contingent upon her survivorship, and gives her no right of disposition, entry, or possession, independent of her husband, the statute of limitations does not begin to run against her until her interest has become mature by his death, even though a title by adverse possession has fully ripened as against him before his decease. Directly in point are *Steele v. Gellatly* 41 Ill. 39; *Taylor v. Lawrence*, 148 Ill., 388 (86 N. E. Rep. 74); *Williams v. Williams*, 89 Ky. 381 (12 S. W. Rep. 760 6 L. K. A. 637); *Miller v. Pence*, 131 Ill. 122 (23 N. E. Rep. 1030); *Wright v. Tichenor*, 104 Ind. 185 (3 N. E. Rep. 853); *Thompson v. McCorkle*, 186 Ind. 484 (84 N. E. Rep. 813, 36 N. E. Rep. 211, 43 Am. St. Rep. 334); *Smith v. Myers*, 7 Ky. Law Rep. 443; *Durham v. Angier*, 20 Me. 242; *Moore v. Frost*, 3 N. H. 126; *Smith v. Wehrle*, 41 W. Va. 270 (23 S. E. Rep. 712); *Hart v. McCollum*, 28 Ga. 478; 2 Scribner on Dower, 579; 1 Washburn Real Property (1862) 218, 250. When right of dower once attaches, the hus-

band cannot defeat it by any act or admission on his part; and neither his laches, default, covin, nor crime will be permitted to prejudice her right. *Williams v. Courney*, 77 Mo. 588; *Grady v. McCorkle*, 57 Mo. 172 (17 Am. Rep. 676).

Ordinarily, the wife cannot relinquish her dower right in the husband's lifetime, except in the manner provided by statute. *Mason v. Mason*, 140 Mass. 68 (3 N. E. Rep. 19). Dower has long been accorded the careful guardianship of the courts. Lord Coke is quoted as saying, "There are three things highly favored in law—life, liberty, and dower," and McKean, C. J., in *Kennedy v. Nedrow*, 1 Dall. 415 (1 L. Ed. 202) says of it, "It is favored in a high degree by law, and, next to life and liberty, held sacred." The only cases coming under our observance tending to support the appellant's theory are *Winters v. DeTurk*, 133 Pa. 359 (19 Atl. Rep. 354, 7 L. R. A. 658), and *Keys v. Keys*, 58 Tenn. 425. In the former it seems to be held by way of dictum that adverse possession by a disseisor, which ripens into a title against the husband in his lifetime, will bar a claim of dower by the wife; while in the latter case the doctrine contended for by appellant is fully sustained. The clear weight of authority, however, is with the appellee. We are cited to numerous cases holding that adverse possession for the requisite period ripens into an indefeasible title. The conclusion we have reached is not a departure from that rule. Our decision is based upon the proposition that there was no adverse possession by defendant and his grantors as against the plaintiff's demand until after her husband's death. This involves a consideration of the nature of adverse possession. It has been defined as possession by one person which is inconsistent with possession or right of possession by another. *Sheaffer v. Eakman*, 56 Pa. 144; *Morse v. Seibold*, 147 Ill. 318 (35 N. E. Rep. 369). In theory it is a possession founded in trespass or disseisin; an ouster of the true owner, and the continued exclusion of such owner for the

period of the statute of limitations. *Olewine v. Messmore*, 128 Pa. 484 (18 Atl. Rep. 495); *Bryan v. Atwater*, 5 Day, 181 (5 Am. Dec. 136); *Davis v. Bowmar*, 55 Miss. 671. Adverse possession cannot arise until there is some one to dispute the right claimed. *Marble v. Price*, 54 Mich. 466 (20 N. W. Rep. 581).

But in the case before us there was neither title nor possession nor right of possession in the plaintiff during her husband's lifetime, and defendant's possession, not being inconsistent with her inchoate right, cannot be said to have been in hostility to it, and was, therefore, not adverse. Her interest in the land was contingent only; a mere possibility, dependent entirely upon her survivorship. As to her, there was never any actual or constructive ouster. As she was never seised of the title, or any part thereof, until the husband's death, there was no disseisin in fact or in law. She had no claim upon the rents or profits, and was not chargeable with taxes or repairs. She could not maintain action of trespass against the persons in possession. There was no apparent release or judicial sale requiring action by her to remove a cloud so created upon her right. If defendant and his grantors had obtained their title through a deed from the husband in which the wife did not join, probably no one would contend that such conveyance and possession under it, no matter how long continued prior to the husband's death, would bar the wife's right of dower if she outlived him. Upon what principle shall we say, in the absence of statute to such effect, that a title obtained in hostility to the husband shall be more effective to eliminate the rights of the wife than a voluntary conveyance by him. If we do so decide, then we hold, in effect, that a wrongdoer may demand greater favor at the hands of the court than one who keeps strictly within the limits of his legal rights; for the grantee in the deed takes and holds possession as the true owner, while, as we have seen, adverse possession is

founded upon the idea of a protracted ouster or disseisin of the true owner. In the absence of a statute to that effect, a sale upon judicial proceedings against the husband does not extinguish the dower right of the wife, and she may enforce it against the purchaser at such sale if she survive the husband. *Pense v. Hixon*, 8 Iowa, 402. In some states it is held that a tax sale will not operate to extinguish dower. *Thompson v. McCorkle*, 136 Ind. 484 (34 N. E. Rep. 813, 36 N. E. Rep. 211, 43 Am. St. Rep. 334); *Shell v. Duncan*, 31 S. C. 547 (10 S. E. Rep. 330, 5 L. R. A. 821). But in this state a tax title is considered, not as being derivative from the delinquent taxpayer, but as a new and independent title, granted by the sovereign power of the state, and as extinguishing all claims based upon the old title. *Bull v. Gilbert*, 79 Iowa, 547; *Bellows v. Litchfield*, 83 Iowa, 36.

Much of the seeming difficulty in this class of cases is obviated by remembering that the widow's right of dower is not like that of an heir derived by descent from the husband, nor does it date from his death. The right becomes complete in her the instant there is a concurrence of seisin in the husband and marriage relation between the parties. It is not called into existence by the grant or grace or favor of the husband, and the wife holds it wholly independent of him. It is said in *Park on Dower*, page 237, to be "a right attaching by implication of law, which, although it may never be called into effect (as when the wife dies in the lifetime of the husband), yet from the moment the fact of marriage and of seisin have concurred, it is so fixed upon the land as to become a title paramount to that of any person claiming under the husband by any subsequent act. After this right has once attached, it is held by the wife entirely independent of her husband, and it cannot be affected by any act or omission on his part." *Cunningham v. Shannon*, 4 Rich. Eq. 140; *Tibbetts v. Langley*, 12 S. C. 465. And, while her right becomes

effective only upon the husband's death in her lifetime, her dower attaches to the land not from the date of his decease, but from the date when her inchoate right had its origin.

Counsel argues that this conclusion renders possible the existence of two or more dower estates in the same land because in the time between the years 1858 and 1900 several different persons may each have successively acquired an independent title to the land by adverse possession, and, if all die leaving widows, each relict, under the doctrine here approved, may be dowerable in the same premises. But the spectacle of two dowers in the same estate is by no means unknown. *McLeery v. McLeery*, 65 Me. 178 (20 Am. Rep. 683). Such complications may easily exist even without the intervention of adverse possession or the statute of limitations. Instead of counsel's illustration of five successive owners by adverse possession, let us assume five successive owners by deed of the same land in five successive days, each of the owners being a married man, whose wife does not join in the conveyance. If then on the sixth day these five men perish in some calamitous accident, each of the five widows will have an undoubted right to dower in the land which has been the subject of the transfers of title. This does not cast upon the court, as the counsel seems to think, the problem of finding "five thirds" in a single item of property, for each of the subsequent grantees took the title subject to the unreleased inchoate dower rights already existing in the land; and the right of his widow to dower is not to the one-third of the whole, but to the one-third of whatever remains after setting off the share or shares of those who are prior in order of time.

The question whether the plaintiff's dower is to be measured and governed by the law as it existed in 1855 or by the present statute, and of the rights of the parties in respect to improvements on the land, is not presented by the record, and need not be considered.

The judgment of the district court is **AFFIRMED**.

120	743
131	520
133	156

CHARLES CURD, Appellee, v. H. L. WISSER, Executor of
the Will of Anna P. Curd, Appellant.

Estates of Decedents: CLAIM AGAINST ESTATE: EVIDENCE. In an

1 action to establish a note against the estate of decedent, there was evidence tending to show that the note was written on a single sheet of paper, that it was executed by deceased, the mother of plaintiff and her husband, and delivered to a third person for plaintiff's use, but afterwards, on plaintiff's order, was delivered to his father, and while in his possession the signatures were severed from the body of the note, the several parts being left in the desk where the same was kept. *Held* sufficient to support a verdict for plaintiff.

Communications With Deceased: EVIDENCE: ADMISSIBILITY.

2 In an action to establish a note as a claim against an estate, evidence by a joint maker that deceased signed the note is inadmissible, under Code, section 4604, though when stricken out is harmless, but evidence that the payee ordered delivery of the note to the surviving joint maker and that it was afterwards in his possession is admissible.

Evidence: ADMISSIBILITY. In defense to an action to establish a

3 note as a claim against an estate, the executor testified that when the note was presented claimant stated that he had personal property belonging to deceased which he would turn over if the note was allowed, if not he should keep it, was properly stricken out as tending to inject a new issue.

Appeal from Audubon District Court.—HON. A. B. THORNELL, Judge.

THURSDAY, MAY 28, 1903.

PETITION for allowance of claim against the estate of the testatrix. Trial to jury. Verdict for plaintiff, and defendant appeals.—*Affirmed.*

George F. Knapp, S. G. Van Auken and Cossan & Ross for appellant.

J. M. Graham, W. C. Elliott and W. R. Copeland for appellee.

WEAVER, J.—Annie P. Curd died without issue, leaving her husband, M. L. Curd, surviving. The appellee is a son of M. L. Curd by a former marriage. The claim is based upon a writing alleged to have been made in the following words: "Exira, Iowa, Sept. 14, 1895. Upon the death of Annie P. Curd and M. L. Curd the makers hereof, we, or either of us, promise to pay to Charles Curd the sum of twelve hundred (\$1,200) dollars, without interest. If transferred before maturity this note is void. Annie P. Curd. M. L. Curd." The body of the writing introduced in evidence is found upon one piece of paper, and the signature upon another, but plaintiff contends these pieces were originally joined in a single sheet; that the signatures were subscribed to the note, but have since that time been severed by the unauthorized act of some person unknown. The defendant denies that such a note was ever executed or existed, denies that the name Annie P. Curd there appearing is the genuine signature of the deceased, and alleges that, if such note ever existed, it has been fully paid and discharged.

I. Appellant's first proposition is that the evidence is insufficient to justify a finding for the plaintiff. Without attempting to set out the testimony of the witnesses,

1. CLAIM against it must be admitted that there is much in the estate: civil-
denec. record to raise grave doubt in the mind of the average reader concerning the good faith and validity of the claim. As is too often the case in family controversies over the estates of the dead, there is manifest a bitterness of feeling among the parties, which, to say the least, is not conducive to a candid and unbiased disclosure of all the facts. Under such circumstances it is rarely possible to reach a conclusion which is altogether satisfactory, and the verdict of twelve disinterested jurors upon the facts in question is to be given peculiar weight. They have the witnesses before them, and can observe the symptoms of partisanship, vindictiveness, and evasion, as well as evi-

dences, if any, of frankness and fairness, and can estimate the weight and value of their testimony more correctly than is possible from a mere reading of the printed report. There is evidence here from which, if credited by the jury, it might be found that these two pieces of paper were originally one sheet, the signatures being subscribed thereon to the written promise to pay; that said note was signed by the testatrix in her lifetime, and delivery made by placing the same in the hands of a third person for plaintiff's use; that thereafter, on plaintiff's order, said note was delivered to M. L. Curd, to be held for the plaintiff, and while in his possession, or in the house occupied by him and the testatrix, the signatures were cut from the body of the note by some person unknown, the several parts being left in a desk or stand where the instrument had been kept. Except the fact of the mutilation of the note and its possession by M. L. Curd, who was a joint maker, there was no evidence that it had been paid. In view of this evidence, it cannot be said that the verdict is without sufficient support in the record.

II. The plaintiff, Charles Curd, and his father, M. L. Curd, testified as witnesses upon the trial in the district court. Objection was duly made to the competency of these witnesses under the statute (Code, section 4604) as being interested parties. The father was permitted to testify that he remembered giving the note, and added that Mrs. Curd signed it. This was manifest error, but immediately after the answer was made the court ordered it stricken out, and we are inclined to the view that this order must be held to have removed any prejudice which might otherwise be presumed to have resulted from the ruling. Charles Curd further testified to having given his father an order to obtain the note from the party having it in keeping; and further stated that he afterward saw it in his father's possession. The father also gave testimony of

2. COMMUNICATIONS with deceased: evidence: admissibility.

the same nature. Under the interpretation which the court has placed upon the statute, the admission of this testimony was not erroneous. *Gable v. Hainer*, 83 Iowa, 457; *Dysart v. Furrow*, 90 Iowa, 59; *McElhenney v. Hendricks*, 82 Iowa, 657; *Walkley v. Clarke*, 107 Iowa, 451. The writer is inclined to the view that our decisions have gone to the extreme limit of liberality in this respect, but the rule of the cited cases has been so long and so frequently followed it must be regarded the settled policy of our law until changed by legislative enactment. The question has been so often reviewed by the court, and the ground covered by the arguments of counsel so often examined and re-examined, it would be unprofitable to renew the discussion at this time. It is sufficient to say that, in our view, the matters to which these witnesses testified do not constitute "personal transactions" or "personal communications" within the meaning of the statute, as we have construed it.

III. The executor was offered as a witness for the defense, and testified that plaintiff presented the note to him for allowance, and at the same time said that, if the claim should be allowed, he had in his possession a large amount of personal property which would be turned over as belonging to the estate of Mrs. Curd; but that, if allowance was refused, he should keep the property as his own. This testimony was stricken out as immaterial, and error is assigned upon the ruling. While, perhaps, there would have been no error in permitting the answers to stand, the matter stated had no such direct relation to or bearing upon the issues being tried that its exclusion can be held prejudicial. It had a distinct tendency to open a collateral issue concerning the ownership of the personal property referred to, and might have proved confusing and misleading to the jury. Other rulings of the trial court to which objections are made appear to be in harmony with the law as stated in this

3. EVIDENCE:
admissibility.

opinion. No question is raised whether the note is in fact due according to its terms, or as to the amount of the allowance if the obligation be found valid.

The judgment below is **AFFIRMED**.

ISAAC BATTLES V. ROBERT ROBERTS, Appellants.

120	747
138	601

Drainage Ditch: NEW ISSUE ON APPEAL. Where the issue on the trial was the right to maintain a ditch for drainage purposes, a new issue involving the right to maintain an embankment which in high water kept it from flowing in another direction cannot be considered on appeal.

Appeal from Polk District Court.—HON. O. P. HOLMES, Judge.

FRIDAY, MAY 29, 1908.

PLAINTIFF asked that defendant be enjoined from causing surface water to flow over his land upon plaintiff's land otherwise than in accordance with the natural drainage, and defendant by cross-petition asked similar relief as against plaintiff. The trial court granted the relief asked by plaintiff, and refused relief to defendant on his cross-petition. Defendant appeals.—*Affirmed*.

N. T. Guernsey for appellant.

W. O. Swearingen and Bowen, Brockett & Alberson for appellee.

McCLAIN, J.—Plaintiff in his original petition and amendments thereto makes it appear that he is the owner of eighty acres of land abutting on the west line of Jasper county, and that defendant is the owner of a quarter section of land across the county line in Polk county, the two tracks being separated by a highway on the county line; and the relief asked is that defendant be enjoined from diverting the course of the surface water which had for

many years flowed from the south along the course of a ditch northward through defendant's land, and been discharged eastward across the highway upon plaintiff's land near the north end thereof, and causing it to be discharged by means of a ditch along the south line of defendant's premises, across the highway and upon plaintiff's land, and at the south end of such land. Subsequently it was made to appear by the defendant in his cross-petition that plaintiff was the owner also of an eighty acre tract in Polk county, lying along the county line, south of and adjoining the defendant's land, and defendant asked relief with reference to the discharge of water from plaintiff's Polk county tract northward upon defendant's tract.

It appears that prior to the acquisition of these tracts by the respective owners a ditch had been constructed running northward from about the center of plaintiff's Polk county tract and through defendant's land, and the cross-action of defendant against plaintiff was based on the claim that this ditch threw upon defendant's land water which otherwise would have flowed over the surface in a northeasterly direction from plaintiff's Polk county tract to the south end of his Jasper county tract. But, as the court found against defendant on his cross-petition, it must be assumed, as it is assumed by counsel on each side, that this result was in consequence of a determination by the court that the plaintiff had the right to maintain the ditch carrying the water from his Polk county tract in a northern direction, and discharging it through a continuation of said ditch on defendant's land. The counsel for appellant, who, by the way, did not represent him on the trial in the lower court, now concedes the correctness of the conclusion of the trial court enjoining the maintenance by defendant of the east and west ditch, carrying the water in an easterly direction and discharging it across the highway upon the southern portion of plaintiff's Jasper county land, and also the correctness of the ruling

that defendant was not entitled to relief on his cross-petition against the maintenance by plaintiff of the north and south ditch on his Polk county tract, but claims that the trial court erred in not enjoining the maintenance by plaintiff of an embankment or so-called dam about the middle of his Polk county tract, where the ditch from the south begins, the result of which is to prevent overflow water from passing in a northeasterly direction from that point across the highway and upon the southern end of plaintiff's Jasper county tract, and restrains it in the ditch, so that it flows northward and is discharged into the continuation of the same ditch on defendant's land. The difficulty with this claim is that it is made for the first time in this court. This embankment or dam seems to be in the old bed of a stream running through plaintiff's Polk county land, about the middle thereof, in a northeasterly direction, and there is no doubt in our minds from the evidence that the ditch from the south to the north connects with this bed, and was intended to convey northward the water formerly running in a northeasterly direction along the course of such stream as there may have been at this place. The practical finding of the trial court, which counsel for appellant now concedes to be correct, was that this ditch was properly constructed and maintained, and, if so, we hardly see how appellant is entitled to have the plaintiff enjoined from keeping up such an embankment as to render the ditch effectual for the purpose for which it was constructed. There was no controversy on the trial with reference to the maintenance of the embankment or dam itself, but only with reference to the maintenance of the ditch, and it will not do now to inject into the case a wholly new question, to wit, whether the plaintiff shall be enjoined from maintaining the embankment or dam, which will prevent overflow in times of high water and throw all the surface water northward through the ditch.

Moreover, the evidence tends to show that at various times, and as a part of the maintenance of this north and south ditch, there has been an embankment or dam at the very place where the reconstructed embankment now stands, and we have no question under the evidence but that the maintenance of the ditch itself, which defendant's counsel concedes to be rightful, involved the throwing of the water, which would otherwise have flowed northeasterly along this old channel, into the ditch running northward from the central part of plaintiff's tract. It is not necessary to set out the pleadings; it is enough to say that it appears therefrom without controversy that the case as presented by the counsel representing defendant, on the trial in the lower court was with reference to the right to maintain the north and south ditch, and not with reference to the right to maintain a particular embankment or dam as above specified. Defendant cannot now be allowed to have specific relief, which he did not ask in the pleadings, with reference to the maintenance of this embankment, even though the evidence showed, as we think it does not, that the embankment in itself is a new structure, and not a part of the original ditch as constructed.

Our conclusion is that the decree of the lower court is correct, and it is **AFFIRMED**.

INDEX

ABANDONMENT

TO

ADVANCEMENT

ABANDONMENT—See CONDEMNATION.

ACCOUNTING—See RECEIVERS.

Rents and Profits.—In an action to set aside an exchange of properties on the ground of fraud where a rescission is decreed, an accounting of improvements, rents, profits and expenses may be had and such judgment rendered in favor of the party entitled thereto as will place them *in statu quo*.—Campbell v. Spears, 670.

ACKNOWLEDGMENTS.

Deed.—Acknowledgment is not necessary to the validity of a deed between the parties.—Slatterly v. Slatterly, et al., 717.

ACTIONS.

Setting Will Aside.—The probate of a will may be set aside in a law action.—Kirsher v. Kirsher, 337.

Premature Suit.—Where a contract for the sale of machinery provides that a note for a stated amount and falling due at a specified time shall be given in part payment, and upon failure to give the note the contract shall stand as the obligation of the purchaser, having the same force as the note, a suit on the contract brought prior to the time the note would have matured, is premature.—Reeves & Co. v. Lamm Bros., 283.

Misjoinder.—Misjoinder of causes of action not taken advantage of by motion to strike, is waived.—Campbell v. Spears, 670.

ADOPTION.

What Articles of Must Contain.—Under sections 2600 and 2601 of the Revision of 1860, articles of adoption which fail to show "consent of the parent to such adoption" or that the child was "given to the person adopting as his own child" are not in compliance with the statutes, though liberally construed, and therefore invalid.—Hopkins v. Antrobus, Ex'r, 21.

ADEMPITION—See ESTATES OF DECEDENTS.

ADVANCEMENT—See EVIDENCE.

Gift—Burden of Proof.—A voluntary conveyance to a child is presumed to be an advancement, and the burden is on him who claims it to have been a gift to establish that fact.—Ellis et al. v. Newell, 71.

What Constitutes.—An advancement is a voluntary gift made by the parent with the intent that it shall be taken into account on the settlement of his estate.—Bissell v. Bissell, 127.

ADVANCEMENT Continued

TO

AGENCY

Same.—In a suit for divorce by the wife, a sum treated as alimony was placed in the hands of a trustee for the benefit of a minor child. The custody of the child was awarded the wife and the husband relieved from further liability for support of the child. Held, on settlement of the husband's estate the sum placed with the trustee was not an advancement to the child.—*Idem*.

ADVERSE POSSESSION.

Payment of Rent.—Payment of rent for a series of years by the occupant of land will preclude his heir from acquiring title by adverse possession.—*Slatterly v. Slatterly et al.*, 717.

AGENCY.

Authority of Agent—Custom.—One dealing with an agent may in the absence of notice of limitations assume that he has authority to sell according to the local custom.—*Commission Co. v. Elwood*, 632.

Burden of Proof.—Where the plaintiff relies on a letter claimed to have been written by defendant as his authority to make a contract for the sale of her land, and the only evidence of its genuineness is the testimony of witnesses that they are accustomed to comparing signatures and that the handwriting on the envelope containing the letter is the same as the signature of defendant affixed to other instruments, and where defendant denies having written the letter or having knowledge thereof, there is a failure to sustain the burden of proof cast upon the plaintiff to establish his agency.—*Darr v. Darrow*, 29.

Commissions—Secondary Evidence.—In an action partially based on three letters, two of which defendant admitted in his answer, and his testimony as to the contents of the third was substantially as set out in the petition, the fact that the court permitted evidence of their contents without a formal notice to produce was harmless error.—*Borden v. Isherwood*, 677.

False Representations—Sale of Land—Liability of Agent.—Where an agent for the sale of land willfully misrepresents the title, and the purchaser, relying upon his statements, is induced to purchase without examination of the title and is defrauded thereby, the agent cannot avoid liability for the loss on the ground that he was acting in a representative capacity, and an instruction embodying this rule is correct.—*Riley v. Bell*, 618.

Fraudulent Representations—Liability of Agent—Estoppel.—Where an agent for the sale of land induces the purchaser to buy by falsely representing that a material fact is true within his knowledge, and damages result, the agent cannot thereafter be heard to say that he in fact had no knowledge of the subject concerning which the representations were made by him.—*Idem*.

Performance by Purchaser—Payment.—An agent for the sale of land has no implied authority to accept in part payment anything but cash, and where the contract recites part payment

AGENCY Continued

TO

APPEAL

in a stated sum which is not in fact paid in money, there is a failure of the purchaser to perform the contract which will defeat specific performance at his suit.—*Wilken v. Voss et al.*, 500.

Repayment of Rent—Liability of Landlord.—The promise of an agent to repay money advanced to him on an unauthorized contract of lease cannot be enforced against the principal in the absence of a showing that the principal had received some benefit therefrom.—*Stover v. Flower*, 514.

Repayment of Rent—Liability of Landlord—Presumption.—Where one enters into a conspiracy with an agent to lease property of the principal, in the name of another and for an immoral purpose, there is no presumption that the agent was authorized to receive rent therefor, and money paid the agent under such circumstances cannot be recovered from the principal.—*Idem*.

Sale of Land by Agent—Unauthorized Contract—Ratification.—Where a real estate dealer enters into a contract for the sale of land on terms other and different from those given him by his principal, the same is not binding upon the principal unless subsequently ratified.—*Sleeper v. Murphy*, 132.

Ratification—Evidence.—Where by the conduct and correspondence of the principal he ratifies the unauthorized contract for the sale of his land by his agent, the same is irrevocable. Evidence considered and held to constitute ratification.—*Idem*.

Sale of Land—Right to Commissions.—Where a real estate broker contracts with his principal to find a purchaser for his farm at a stated price for an agreed commission and performs his part of the contract, the fact that the principal reserves the right to prescribe the terms of sale when a purchaser is found will not defeat the agent's right to his commissions.—*Collins v. Padden*, 381.

Where an agent without authority leases property for an immoral purpose and receives part of the rent, it cannot be recovered from the principal on a disaffirmance of the contract.—*Stover v. Flower*, 514.

APPEAL.

Adjudication.—Where the subject of litigation was appealed to the state superintendent and the same conclusion reached by him which the court arrives at, it is not necessary to determine whether the remedy by appeal is exclusive or constitutes an adjudication binding upon the court.—*Independent Dis. v. Dis. of Kelley*, 119.

Jurisdiction—Revival of Cause.—The district court loses jurisdiction of the parties and the subject-matter of the suit when an appeal is taken, and upon affirmance of the decree without an order remanding the cause the issuance of a *procedendo* will not revive it.—*Dunton v. McCook et al.*, 444.

VOL. 120 IOWA.—48.

ADVANCEMENT Continued

TO

AGENCY

Same.—In a suit for divorce by the wife, a sum treated as alimony was placed in the hands of a trustee for the benefit of a minor child. The custody of the child was awarded the wife and the husband relieved from further liability for support of the child. Held, on settlement of the husband's estate the sum placed with the trustee was not an advancement to the child.—*Idem*.

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AGENCY.

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Performance by Purchaser—Payment.—An agent for the sale of land has no implied authority to accept in part payment anything but cash, and where the contract recites part payment

AGENCY Continued

TO

APPEAL

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VOL. 120 IOWA.—48.

APPEAL Continued

TO

ARREST

Sufficiency of Notice.—A notice of appeal which states "intervenor in the above cause has appealed the same to the supreme court * * *" is not open to the objection that it does not specify what is appealed from, even though there were practically two judgments where exception was taken to both.—*Augustine v. McDowell et al.*, 401.

APPEAL BOND.

What Secured Thereby.—A bond given to supersede the issuance of an execution on a judgment involving specific property, conditioned to pay costs and damages adjudged against appellant on appeal and to satisfy and perform a judgment rendered on appeal, does not include rents, damages, profits or taxes in relation to the property covered by the judgment which appellant has allowed to accumulate during the appeal.—*Streeter v. Gleason et al.*, 703.

Reformation of.—A supersedeas bond executed through mistake may be reformed in equity.—*Idem.*

Extent of Reformation.—In the absence of evidence as to agreed conditions in an appeal bond its reformation, if allowed, will be to conform it to the statute.—*Idem.*

ARBITRATION.

Umpire—Award.—Where an arbitration agreement requires an umpire to act in case of disagreement and no difference appears, nonparticipation by the umpire will not invalidate the award.—*Vincent v. Ins. Co.*, 272.

Award—Delay.—Where arbitrators were appointed March 2d and made their award July 28th of the same year, there is no such delay as will invalidate the award.—*Idem.*

Award—Mistake of Judgment.—Mistake of judgment on the part of arbitrators will not invalidate an award unless so great as to indicate bias.—*Idem.*

Notice of Arbitration—Waiver.—A party to an arbitration, who notifies an arbitrator that he will not attend and refuses the request of the arbitrator to attend, waives his right to notice of time and place of meeting.—*Idem.*

Arbitration—Failure to Take Evidence.—Arbitrators who are appointed to "ascertain and appraise" the value of, and loss upon the property, are not required to take evidence, and failure so to do will not invalidate the award.—*Idem.*

ARREST.

Illegal Arrest—Responsibility of Mayor—Evidence.—In an action against the marshal and mayor of a town for an illegal arrest of one claimed to have interfered with the city officials in their efforts to open a claimed street, the fact that the mayor directed the marshal to protect the street commissioner in opening the street, and when arrested refused to discharge plaintiff and caused him to repeatedly appear for trial, finally informing him there was no charge made, is sufficient to connect the mayor with responsibility for the arrest.—*Young v. Gormley et al.*, 372.

ARREST Continued

TO

ATTORNEY'S FEES

Interference with Private Property.—Authority of City Officials.—

Arrest.—A mayor or other city official has no more right as such officer to dispossess a citizen of the town of land claimed by him without legal process than one citizen has to dispossess another, and when a citizen resists the wrongful and unauthorized acts of city officials in interfering with his property and is arrested without warrant, the arrest is wrongful.—*Idem.*

ASSAULT—See CRIMINAL LAW.

ASSIGNMENT OF ERROR—See PRACTICE

ASSUMPTION OF RISK—See NEGLIGENCE.

ATTACHMENT.

Objection to Sale—Damages—Estoppel.—After levy of attachment, the sheriff summoned a jury to determine the danger of depreciation in value of the attached goods, before whom defendant appeared and protested against a sale. Held, defendant was not estopped by such appearance from claiming damages for a wrongful attachment after such protest.—*Lord, Owen & Co. v. Wood, 303.*

Wrongful Attachment—Instruction.—On an issue for wrongful attachment, an instruction that if the jury find that plaintiff "did not believe or had no reasonable ground for believing" that defendant was about to wrongfully dispose of his property, the attachment was wrongful, and a recovery may be had, is error, as it ignores the fact that defendant must also prove that the ground of the attachment was in fact untrue.—*Idem.*

Wrongful Garnishment—Instruction.—An instruction that if the jury find that at the time of the commencement of the action defendant was owing plaintiff less than \$5, then the suing out of the writ of attachment was wrongful, is erroneous, as it is the amount claimed and not the amount recovered that governs the issuance of the writ, under Code, section 4579.—*Insell v. Kennedy, 234.*

ATTORNEY'S FEES.

Taxation of Attorney's Fees.—In an action on an attachment bond, the taxation of attorney's fees is limited by Code, section 3887, to fees earned at the time judgment is rendered in the district court; neither the district nor the appellate court has any authority to tax fees for the prosecution of an appeal.—*Kilmer v. Gallaher, 575.*

Same.—In an action on an attachment bond defendant recovered a verdict which never went to judgment by reason of an unauthorized settlement made by one of his attorneys. On a retrial of the case, after reversal on appeal, the trial court refused to allow attorney's fees for services on the first trial as part of the damages on the attachment bond. Held, not an improper exercise of the trial court's discretion.—*Idem.*

ATTORNEY'S FEES Continued

TO

BOUNDARIES

Separate Liability of Defendants—Evidence.—Plaintiff's claim for attorney fees was admitted by defendants and the issue was between the defendant bank and Stone, its president, as to liability therefor, which was submitted to the court on stipulation. The principal portion of the claim in dispute related to negotiations which culminated in a contract that brought about a complete settlement of the affairs of the bank, and which could not be carried out except by its consent, and while Stone chiefly conducted the negotiations, yet the finding of the trial court that the services were rendered for the bank, had sufficient support in the evidence, and the release of Stone from liability was therefore not error.—*Wright & Hubbard v. First Nat'l Bank et al.*, 160.

Taxation of Attorney's Fees—Apportionment of Costs.—In a condemnation proceeding, where a trial on appeal to the district court results in a reduction of the damages assessed, the court has no authority to tax against the railway company an attorney's fee for plaintiff's attorney or to apportion the costs, under Code, section 2007.—*Wormley v. Ry. Co.*, 684.

BILLS AND NOTES.

Want of Consideration—Burden of Proof.—Under Code, section 3069, both a note and a deed import a consideration, and the burden is on the party affirming want of consideration for either to show it.—*Luke v. Koenen*, 103.

Laches—When Will Defeat Recovery.—Where it appears that the payee's administratrix lived only two years after the maturity of a well secured note drawing ten per cent. interest and the succeeding administrator dies before the estate is closed, equity will not defeat a recovery on the ground of laches in the absence of proof that defendants have suffered thereby.—*Idem*.

BOARD OF HEALTH—See QUARANTINE.

Disinfection of Property—Liability of County.—The compensation and expense incurred by one employed by a city board of health to disinfect the dwellings and contents of quarantined persons, who have been afflicted with contagious disease, is not a charge against the county, and there is no statutory authority for its payment by the county.—*Schmidt v. Muscatine Co.*, 267.

Same—Disinfecting Pest House.—A county is not liable for the cost of disinfecting its pest house until after notice by the board of health and opportunity to do the work itself.—*Idem*.

BONDS—See SURETIES—APPEAL BOND.**BOUNDARIES.**

Change of Boundaries.—Time does not settle the boundaries of an independent district so that they cannot be changed according to law.—*Independent Dist. v. Dist. of Kelley*, 119.

BOUNDARIES Continued

TO

CHANGE OF VENUE

BRIDGES—See MUNICIPAL CORPORATIONS—EVIDENCE—NEGLIGENCE
—NOTICE.

BUILDING AND LOAN.

Loan to Wife—Liability of Husband—Usury.—A husband who joins in the execution of a note and mortgage on the wife's property to secure the payment of a loan made to her by a building and loan association of which she was a member, becomes a surety for the payment of the debt according to her contract, and cannot avail himself of the defense of usury.—*Building and Loan Ass'n v. McClain*, 527.

Preferred Stock—Legalizing Act.—Chapter 48 of the Acts of the 27th General Assembly legalizing the system of premiums, fees and fines exacted by building and loan associations has no application to the issuance of preferred stock.—*Winegardner v. Loan Ass'n*, 485.

Issuance of Guaranteed Stock—Power of Association.—Where a building and loan association issues its stock on an agreement that it will mature in a specified time, and guarantees that if there is not then sufficient money to its credit the deficiency will be paid out of its guaranty fund, consisting of money derived from the sale of other stock and from stock payments, the same constitutes a preferential contract not within the power of a building and loan association, and a company entering into it is not entitled to the benefit of the statutes relating to such associations.—*Idem*.

BURDEN OF PROOF.—See EVIDENCE—PRACTICE.

BURGLARY—See CRIMINAL LAW—EVIDENCE AND INSTRUCTIONS.

Possession of Property—Instruction.—Where certain goods were stolen from a building by breaking and entering, proof of subsequent possession without reasonable explanation will support a conviction for the crime of breaking and entering, and an instruction embodying this rule is not open to objection.—*State v. Swift*, 8.

Possession of Stolen Property—Instruction.—It is only when the breaking and entering and the larceny are committed at the same time and by the same person that the recent possession of the stolen property will justify a conclusion that the person who stole the property also did the breaking and entering.—*State v. Williams*, 36.

CHAMPERTY.

It is competent for a county in making a contract to discover taxable property to agree as to the payment of the expenses incurred thereby, and the same is not champertous.—*Shinn v. Cunningham et al.*, 383.

CHANGE OF VENUE.

Mortgages—Foreclosure.—Where action is brought by the assignee of a real estate mortgage to foreclose the same, and the defendant by a cross-petition against the original mort-

CHANGE OF VENUE Continued

TO

CONTRACTS

gagees and others, claims damages for fraudulent representations inducing the execution of the mortgage, in case of cancellation of the same is not decreed, the defendants in the cross-petition are not entitled to a change of venue to the respective counties of their residence.—*Brown v. Holden et al.*, 191.

CHATTEL MORTGAGES.

Description.—A mortgage covering "seventy, more or less, of corn in field" is not such a description as may be aided by extrinsic evidence; it is in fact no description.—*Augustine v. McDowell, et al.*, 401.

Decree of Foreclosure—Collateral Attack.—A decree directing sale under special execution of property covered by a chattel mortgage in another county cannot be collaterally attacked, even though the mortgage provides for a sale in the home county.—*King v. Nelson*, 606.

Special Execution—Issuance of.—On the foreclosure of a chattel mortgage, where the petition states the requisite facts, the decree may direct the issuance of a special execution for any part of the property wherever located in the state.—*Idem*.

Presumption as to Title.—The execution of a chattel mortgage does not raise the presumption that the mortgagor is the owner of the goods covered by the mortgage, especially as against one not a party to the mortgage.—*Syck et al. v. Bossingham*, 363.

CITIES AND TOWNS—See MUNICIPAL CORPORATIONS.

CONDEMNATION—See JUDGMENTS.

Abandonment.—A condemnation of private property by a city may be abandoned where the same is in good faith and includes the entire proceedings, but if there is not such a good faith abandonment the finding of the sheriff's jury or of the trial jury on appeal constitutes an adjudication binding upon the condemnor.—*Robertson v. Hartenbower*, 410.

DOMMISSIONS—See AGENCY.

CONTRACTS.

Commissions—Rejection of Orders.—A contract providing that an agent shall receive a commission for the sale of goods on all orders taken by him which his principal may "accept and ship" is binding to the extent only of the accepted orders, in the absence of a showing of bad faith on the part of the principal in rejecting orders.—*Wolfson v. Allen Bros.*, 455.

To Discover Taxes.—In the absence of evidence of the value of services in discovering for taxation omitted property, the court cannot say as a matter of law that the contract is unreasonable or the compensation paid excessive.—*Shinn v. Cunningham et al.*, 383.

Validity of Contract—Subsequent Legislation.—Chapter 50, Acts of the 28th General Assembly, limiting the compensation for

CONTRACTS Continued

TO

CONVERSION

the discovery of taxable property to fifteen per cent. of the tax recovered did not affect a contract made prior to its enactment.—*Idem*.

Land Contract—Revocation.—A contract for the purchase of real property entered into between plaintiff, the owner of the property and also the holder of a certificate of sale thereto, whereby plaintiff is to acquire full title from the other parties, is revoked by the transfer of the certificate of sale to another who acquires a deed thereunder, the consideration for which is claimed by the owner, and may be cancelled at the suit of the plaintiff.—*Newcomb v. Plow Co. et al.*, 570.

Liability of Vendee.—Where the vendor by his own act, though indirectly, places it beyond his power to pass title according to his contract, the vendee is not liable for the purchase price though in default in the payment of taxes.—*Idem*.

Insurance—What Law Governs.—The law of the place where an agreement is finally consummated will govern the contract, unless it is shown that the same was to be performed elsewhere.—*Born v. Ins. Co.*, 299.

Reformation—Specific Performance.—Equity will reform a writing entered into under a mistake as to the legal effect of the words used, and when such is the fact, specific performance will be denied.—*Hopwood v. McCausland*, 218.

Written Admission of Contract—Statute of Frauds.—A receipt for rent notes, providing that if the tenant shall pay the landlord \$4,000 "on the purchase price of farm, and deliver a mortgage for the whole amount" the lease and notes shall be returned, is insufficient as a written admission of an oral contract of purchase to take it out of the statute of frauds, and the court cannot look beyond the writing itself to ascertain the terms of the contract.—*Allen v. Bemis*, 172.

COMPENSATION—See COUNTY OFFICERS.

CONVERSION—See GOODWILL—SCHOOLS.

Stock of Goods—Evidence.—Plaintiff purchased a stock of goods, taking a bill of sale which was improperly acknowledged and never recorded, and his brother went into possession. Thereafter he gave a mortgage on the stock to secure a note signed by himself and brother for the purchase price, which was duly recorded and assigned to the intervener. Defendant claimed the goods under an attachment against plaintiff's brother; plaintiff admitted that he did not own the goods but claimed that the bill of sale was in fact a mortgage to secure him as surety on the note. It also appeared that most of the goods covered by the mortgage had been sold and the remainder mingled with another stock owned by the brother of plaintiff. Held, that in an action for conversion a verdict was properly directed for defendant.—*Syck et al. v. Bossingham*, 363.

Sale of Goods—Action by Mortgagees.—The owner of a stock of goods, after executing mortgages thereon, gave a bill of sale

CONVERSION Continued

TO

CRIMINAL LAW

to another who went into possession, and thereafter the owner was declared a bankrupt. On demand, the purchaser refused to deliver the goods to the mortgagees until he could consult an attorney, but the next day made a formal tender and requested that a time be fixed for an accounting of goods sold. Held, in a suit by the trustee in bankruptcy against the purchaser and mortgagees to recover the goods, in which it was determined that both the mortgages and bill of sale were void, it was error to render judgment on a cross-petition of the mortgagees against the purchaser for conversion.—*Stanley v. Southwick*, 481.

CONSTRUCTION OF STATUTES—See STATUTES.

Laws of Another State—Opinions of its Courts.—Courts of one state will not take judicial notice of laws of another, but the opinions of a court of last resort in construing its statutes are entitled to weight.—*Hendryx v. Evans et al.*, 310.

CONVEYANCES— See DEEDS.**COSTS.**

Taxation of Costs.—In an action to set aside the probate of a will, all parties being children of deceased and contestants being successful, there was no error in taxing the court costs to the estate, the attorneys' fees to be paid by the parties.—*Kirsher v. Kirsher*, 337.

COUNTY OFFICES.

Recorder—Recovery for Assistance.—Under Code, section 496, a county recorder cannot recover from the county for the services of an assistant, when the bill therefor is not filed at the next regular meeting of the board of supervisors after the rendition of the services.—*Allen v. Adams Co.*, 63.

Allowance of Compensation.—In an action by a county recorder to recover for assistance, it is immaterial how much, if anything, the recorder paid the assistant, provided the bill is for services necessarily employed and the amount claimed is the reasonable value of the service.—*Idem*.

COUNTERCLAIM —See LANDLORD AND TENANT.**CRIMINAL LAW** — See QUARANTINE.

Assault With Intent to Commit Murder—When Special Instruction Not Required.—On a prosecution for having sent a box containing explosives for another to open, with intent to commit murder, and the jury are told in various instructions that a finding that defendant was in fact the person who sent the box was essential to conviction, it is not necessary, in the absence of a request, to devote a special instruction to that subject.—*State v. Hoot*, 238.

Breaking and Entering—Indictment.—In an indictment for breaking and entering, it is sufficient to aver possession in someone, without alleging the name of the owner.—*State v. Williams*, 36.

CRIMINAL LAW Continued

Burglary—Circumstantial Evidence.—It is not necessary for the state to produce a witness who actually saw the property taken at the time of the breaking and entering. This fact like any other can be proved by circumstantial evidence, and where the circumstances shown are inconsistent with any other rational hypothesis than that the building was broken and entered with intent to steal and that the goods were stolen by breaking and entering, there should be a conviction on a charge of breaking and entering.—*State v. Swift*, 8.

Burglary.—Evidence in the case considered and held insufficient to warrant an instruction based on the theory that defendant was found in possession of the stolen property shortly after the breaking and entering.—*State v. Williams*, 36.

Burglary—Possession.—The court instructed that the possession of the stolen goods if unexplained, was sufficient to warrant the conclusion that the person having the possession broke and entered the building, unless the evidence left a reasonable doubt whether defendant might not have come "honestly" into such possession. Held, the word "honestly," as used, could have no reference to obtaining goods in any other dishonest way than by breaking and entering, and therefore not prejudicial.—*State v. Swift*, 8.

Included Offenses—Evidence.—Where the facts in a case are such that defendant must be guilty or not guilty of the offense charged, failure to instruct with respect to included offenses is not error. Evidence considered and held to show no included offense.—*State v. Hoot*, 238.

Intent.—An instruction in relation to breaking and entering under Code, section 4791, which makes no reference to the intent, is erroneous.—*State v. Williams*, 36.

Criminal Intent.—A husband who sends a box containing explosives to the home of his wife, but addressed to himself, with the expectation that she will receive and open the same and that her death will result, is guilty of assault with intent to commit murder, and the contention that it cannot be presumed that he contemplates that she will, without authority, open the box, the same being addressed to himself and hence no basis on which to predicate a criminal intent, is without merit.—*State v. Hoot*, 238.

Same—Evidence.—In a prosecution for assault with intent to commit murder, a specific intent to kill must be proven. Evidence in the case considered and held to show such intent.—*Idem*.

Same.—On a prosecution for assault with intent to commit murder, the inquiry is "was the defendant inspired by a criminal purpose and intent to make an assault, and did he adopt and put into execution a plan designed to effectuate his purpose and intent," and it is immaterial that in the execution of his plan acts were done unauthorized by the general laws relating to business affairs.—*Idem*.

DAMAGES.

DAMAGES.

Aggravation of Damages.—In an action for an illegal arrest plaintiff may show in aggravation of damages that he was arrested in the presence of his family.—*Young v. Gormley et al.*, 372.

Attachment.—In case of a wrongful attachment, the rent of a building for which defendant was liable and in which he was conducting his business at the time of the attachment, and the value of defendant's time in the particular business in which he was engaged are proper elements of damage, and an instruction not in accordance therewith is error.—*Lord, Owen & Co. v. Wood*, 303.

Breach of Contract.—In an action for a breach of contract, such damages are recoverable as are the natural and proximate consequence of the breach or may reasonably be supposed to have been within the contemplation of the parties at the time the contract was made.—*Wragg & Son v. Mead*, 319.

Covenant Against Incumbrances.—Where the breach is an outstanding lease of the premises, the measure of damages is the rental value of the land for the unexpired term of the lease.—*Idem.*

Remote and Speculative.—Where there is an outstanding lease on property conveyed with a covenant against incumbrances, the fact that the vendor knew the property was to be used by the purchaser for the storage of goods will not impose on him a liability in damages for sums paid by the purchaser during the continuance of the lease in hauling his goods a considerable distance for storage, such damages being too remote and not within the contemplation of the parties.—*Idem.*

Detention.—In a replevin action where one elects to treat the property as converted at the time it was taken and have a money judgment for its value at that time, he is not entitled to damages for detention.—*Powers v. Benson et al.*, 428.

To Crops.—In estimating the damage to a crop of corn by hail, the jury may consider the yield of other fields of similar kind and quality in the same vicinity.—*Condon v. Hail Ins. Ass'n*, 80.

Instruction.—In a suit for damages for an assault, an instruction based on sufficient evidence that if defendant attempted to ride his horse upon or against plaintiff, whereupon defendant, acting as a reasonable man, armed himself with a stick to ward off the attack, and thereby plaintiff's horse was frightened and he received the injuries complained of, then defendant is not liable for damages, is correct.—*Halley v. Tichenor*, 164.

Mental Pain.—In an action for wrongful arrest, the facts and circumstances being shown, the jury may therefrom assess such damages, which, as fair minded men, they believe just and reasonable to allow for mental suffering and humiliation.—*Young v. Gormley et al.*, 372.

DAMAGES Continued

Same.—Damages for mental pain and suffering are actual, not punitive.—*Idem*.

Medical Services.—In an action for injuries the plaintiff is entitled to recover as damages the reasonable value of the medical services performed, but where there is evidence of the amount of the physician's bill, an instruction that he may recover "such sum as will compensate him for money expended and liability incurred for medical treatment" may be sustained.—*Sachra v. Town of Manilla*, 562.

Loss of Time.—In an action for personal injuries, an instruction that plaintiff should be allowed the value of his time while disabled is more favorable than defendant is entitled to, as he may have compensation for loss of time while only partially disabled.—*Idem*.

Loss of Time.—In an action for seduction, where the only evidence of the value of her time lost is that of plaintiff, which shows her avocation to have been a teacher at a salary of from \$30 to \$34 per month, her damage in this respect is what she could earn as a teacher.—*Lampman v. Bruning*, 167.

Medical Attendance.—In an action for seduction, where plaintiff testifies that the doctor's bill was a certain sum, which has not been paid, she is entitled to an allowance, and the reasonableness of the sum may be left to the jury.—*Idem*.

Special Damages.—Special damages are such as do not ordinarily result from a given cause, and to be recovered must be pleaded.—*Kircher v. Town of Larchwood*, 578.

Speculative Damages.—Mere delay in furnishing machinery which does not interrupt an established business will not sustain an action for damages for loss of patronage.—*Mfg. Co. v. Creamery Co.*, 584.

Sewers—Insufficient Capacity.—A property owner who voluntarily constructs a sewer from the basement of his building to the city's main sewer, paying the required fee for permission to do so, and knowing that the city sewer is insufficient at times to carry the surface water and sewerage and that other connected cellars near his own had been flooded, has no right of action against the city for damages caused by the flooding of his cellar by backwater from the city sewer.—*Sheriff v. City of Oskaloosa*, 442.

Street Grades.—A property owner making improvements prior to the establishment of a street grade cannot recover damages caused by bringing the street to a grade thereafter legally established.—*Wilber v. City of Ft. Dodge*, 555.

Same.—Failure of a city council to adopt a resolution ordering the work of bringing a street to grade, in the absence of an allegation and proof of special damages on account of such failure, will not create a right of action in favor of a property owner for damages resulting in bringing such street to grade.—*Idem*.

DEDICATION

TO

DECREES

DEDICATION.

Street—Description.—A plat of an addition to a city is insufficient to establish the dedication of a street where it fails to disclose the lines, corners and dimensions of the land claimed to have been dedicated. The description must be as definite as is required in a conveyance.—*Coe College v. City of Cedar Rapids*, 541.

Evidence.—Intention to dedicate land to a public use may be inferred from its shape, dimensions, situation, etc., but the evidence fails to bring this case within the rule.—*Idem*.

Evidence.—Evidence considered and held insufficient to show a common law dedication of a street.—*Idem*.

DEEDS.

Alteration of.—The unauthorized alteration of a deed after its execution and delivery will not effect its validity.—*Slatterly v. Slatterly et al.*, 717.

Acknowledgment.—Acknowledgment is not necessary to the validity of a deed between the parties.—*Idem*.

Escrow—Right to Recall.—Where a father executes deeds conveying his real estate to his sons and places the same in escrow, with instructions to deliver them upon his death, but retaining the title and control of the deeds and the right to withdraw them, the transaction is of a testamentary character and the father has the right to cancel the deeds at pleasure.—*Everts v. Everts et al.*, 40.

Want of Consideration—Burden of Proof.—Under Code, section 3069, a deed imports a consideration, and the burden is on the party affirming want of consideration to show it.—*Luke v. Koenen*, 103.

Delivery Presumed.—A deed from father to son reciting a consideration and filed for record by the grantor will be presumed to have been delivered.—*Luckhart v. Luckhart*, 248.

Trust in Land—Want of Consideration.—Where a father conveys real estate to a son, reciting payment of consideration, those interested in the grantor's estate cannot establish a trust in the land, where there is no proof of fraud or mistake by showing that the deeds were in fact without consideration.—*Idem*.

Reformation of Deed.—To reform a deed on the ground of mistake, the mistake must be mutual.—*Montgomery v. Mann*, 609.

Possession.—In an action to set aside a deed on the ground of fraud and failure of title, where it appears that plaintiff never took actual possession, the fact that his possession was never disturbed is no defense.—*Campbell v. Spears*, 670.

DECREES— See **JUDGMENTS**.

DEPOSIT

TO

EQUITY

DEPOSIT.

General Deposit.—Where an executor deposits trust funds with a bank, which are subject to check, there being no agreement to return the identical deposit or to apply the same to any specific purpose, the deposit is a general one.—*Officer v. Officer et al.*, 389.

DEPOSIT OF PUBLIC FUNDS—See SCHOOLS.

DOWER.

Limitation of Action.—The statute of limitations does not commence to run against a wife's right of dower until the death of the husband.—*Lucas v. White*, 735.

Wills.—Under section 2452 of the Code of 1873, an acceptance of the provisions of a will did not bar the wife's dower right unless the will so expressly provided, or there was an inconsistency between such right and the provisions of the will.—*Kiefer v. Gillett et al.*, 107.

Construction of Will.—Testator bequeathed to his wife and daughter the use of his farm so long as they desired to manage it, but if it should be sold, the proceeds were to be divided equally between the wife and his two children "the part so given to my wife to be in lieu of her dower." The wife died without any disposition of the farm. Held, the provision "in lieu of dower" related to a disposition of the proceeds of the sale of the farm; that the provisions of the will were not inconsistent with her right to dower in the land, and that she became the owner of a one-third interest in the land which upon her death was subject to her debts.—*Idem*.

DRAINAGE—See WATERS.

Drains—Nuisance—Abatement.—The fact that township trustees contribute to the expense of constructing a drain to carry the water from the land of one onto that of another will not remove a liability of defendant for damage caused thereby; and a tile drain is not a permanent structure, the maintenance and use of which may not be enjoined at the suit of the party injured.—*Costello v. Pomeroy*, 213.

Liability of City in Grading Streets—Damages.—A city may be liable in damages for grading a street, though done in accordance with an ordinance, if thereby the natural drainage is destroyed and no adequate provision is made for disposing of the surface water.—*Wilber v. City of Ft. Dodge*, 555.

Drainage Ditch—New Issue on Appeal.—Where the issue on the trial was the right to maintain a ditch for drainage purposes, a new issue involving the right to maintain an embankment which in high water kept it from flowing in another direction cannot be considered on appeal.—*Battles v. Roberts*, 747.

EASEMENT—See HIGHWAYS—NOTICE.

EQUITY.

Reformation of Contract—Specific Performance.—Equity will reform a writing entered into under a mistake as to the legal

EQUITY Continued

TO

ESTATE OF DECEDENTS

effect of the words used, and when such is the fact, specific performance will be denied.—*Hopwood v. McCausland*, 218.

Appeal Bond—Deposit to Secure Sureties.—A suit in equity against the principal and sureties on a supersedeas bond for damages sustained by reason of the appeal to which a bank with whom the principal deposited funds to indemnify his sureties is made a party, is a proper proceeding to reach the funds in the bank, and the obligee is not required to resort to garnishment for that purpose.—*Streeter v. Gleason et al.*, 708.

Appeal Bond—Reformation of.—A supersedeas bond executed through mistake may be reformed in equity.—*Idem*.

ESTATES OF DECEDENTS.

Claim Against Estate—Evidence.—In an action to establish a note against the estate of decedent, there was evidence tending to show that the note was written on a single sheet of paper, that it was executed by deceased, the mother of plaintiff and her husband, and delivered to a third person for plaintiff's use, but afterwards, on plaintiff's order, was delivered to his father, and while in his possession the signatures were severed from the body of the note, the several parts being left in the desk where the same was kept. Held sufficient to support a verdict for plaintiff.—*Curd v. Wisser et al.*, 743.

Deposit of Trust Funds.—An executor may rightfully deposit trust funds to the account of the estate in a solvent bank.—*Officer v. Officer et al.*, 389.

Trust Funds—Preference.—Where an executor makes a general deposit of trust funds in a solvent bank, neither he nor the *cestui que* trust, in case of a failure of the bank, has any preference over other creditors, though the bank knew the character of the deposit.—*Idem*.

Trusts—Interest of Trustee—Rights of Creditors.—Where a wife devises one-third of her entire property to her husband and the remaining two-thirds to him in trust for her minor child, with full power to sell and convey the trust estate and reinvest the proceeds, and in the exercise of such power the husband appropriates to his own use or squanders a large part of the estate, he still has a one-third interest in the remaining realty which can be reached by his creditors, his interest attaching to each tract and not in the estate as a whole.—*Wales v. Sammis et al.*, 293.

Rights of Beneficiary—Lien of Creditors.—Where a trustee with power of disposal has a joint interest in an estate with a beneficiary under a will, the beneficiary has no lien on the interest of the trustee to reimburse him for defalcations which is paramount to the lien of the creditors of the trustee that attach prior to the time the beneficiary asserts his claim.—*Idem*.

Legacy—Stocks and Bonds—Ademption.—The acceptance by the executors of a testator of a note which he agreed to take in lieu of certain stock or bonds of a corporation owned by him and be-

ESTATE OF DECEDENTS Continued

TO

ESTOPPEL

queathed by his will, does not amount to an ademption of the legacy.—*Frahm et al. v. Steffen et al.*, 85.

Homestead—Apportionment of Incumbrance.—An allowance to the widow of one-third of the real estate, including the homestead, and an apportionment of the incumbrance executed by husband and wife so as to leave the homestead free, is proper, though the widow thereby receives more than one-third the net realty.—*Bissell v. Bissell*, 127.

Widow's Allowance—Fraud.—The statement of a widow in her application for the allowance of a year's support, alleging that her husband died intestate when in fact he left a will, does not amount to fraud, where the other allegations are substantially correct.—*Busby v. Busby et al.*, 536.

Widow's Support.—Code section 3314, contemplates that an allowance shall be made to the widow out of her husband's estate for a year's support of herself and children, even though she may have property in her own right.—*Idem*.

Allowance for Widow—Application to Set Aside—Delay.—Where one of the executors of a will learned of an order making an allowance for the widow shortly after it was made, he cannot have the order set aside on his application filed two years afterwards, because of delay.—*Idem*.

ESTOPPEL.

Building and Loan.—The fact that a holder of preferred stock of a building and loan association, on which she obtained a loan, has made repayments to the amount of such loan will not estop her from asserting the invalidity of the contract.—*Winegardner v. Loan Co. et al.*, 485.

Denial of Partnership.—Where plaintiff extended credit to a supposed firm, relying upon representations of an employe that one of defendants was a member of such firm, if there was in fact no partnership, the employe was not authorized to act for such defendant and he was not estopped to deny the partnership.—*Johnson Bros. v. Carter & Co. et al.*, 355.

Executors Report—Objection To.—The fact that a legatee under a will who is a non-resident of the state employs attorneys to represent her, who advise the executor to make a certain charge against her, will not estop such legatee from resisting such charge on learning the facts and before final settlement of the estate, where it appears that such attorneys, without her knowledge, were also attorneys for the executor.—*In re Cumming's Estate*, 421.

Specific Performance.—Defendant gave plaintiff an option or contract to purchase land, agreeing that plaintiff should notify him of his final conclusion in the matter. Within the time agreed plaintiff's agent notified defendant that he could not raise the money and that unless defendant extended the time, which he refused to do, the option would be abandoned. Thereafter defendant made valuable improvements and leased the land for a

ESTOPPEL Continued

TO

EVIDENCE

term of years. Held, that plaintiff's acts and conduct estopped him from enforcing specific performance.—Hopwood v. McCausland, 218.

Receiver—Filing of Claim.—Where a mortgagee commences foreclosure of his mortgage, issuing an attachment, and afterward a receiver of the mortgaged property is appointed and makes application for an order to sell subject to the mortgages, to which such mortgagee appears, and before an order of sale is granted he files his claim with the receiver, which is disallowed, but an order is granted authorizing an appeal therefrom, the mortgagee thereby elects to rely on his claim against the receiver and is estopped from proceeding against the property on a judgment of foreclosure of his mortgage.—Mercantile Realty Co. v. Stetson et al., 324.

Easement in Street—Representations of Vendor.—Where a grantor sells and conveys lots describing them by metes and bounds, also by reference to the same as designated on a certain plat and represents that the lots are adjacent to a street which he points out on the plat, the grantee takes an easement in the street which the grantor is estopped to deny, even though the plat was not authorized by him, was not legal, and had never been recorded.—Cleaver v. Mahanke et al., 77.

Insurance—Settlement of Assessment.—An agent of a mutual hall association, authorized simply to collect delinquent assessments, settled with a suspended member by allowing him a claimed loss in part payment and accepting his note for the balance, the proceeds of which he remitted the company, with full information as to the settlement. The company notified the assured that the claimed loss could not be allowed but retained the proceeds of the note, and subsequently notified him that an assessment for another year was due. Held, that the company by its conduct had ratified the act of the agent, which restored the assured to membership, and had thereby waived its right to claim a forfeiture of the policy.—Barrett v. Ins. Co., 184.

Sufficiency of Description.—A description of real property that will pass title by a deed is sufficient in a judicial sale, and where one seeking to enjoin an execution sale alleges ownership of the property described in the execution, he is estopped to deny the sufficiency of description.—McCormick v. McCormick Harvesting Mch. Co., 593.

Streets.—Representations of the agent of a third party, a stranger to the title that a space between certain lots is a street, will not estop the owner from asserting title against the claim of a city that the same is a street.—Coe College v. City of Cedar Rapids, 541.

EVIDENCE.

Accident at Crossing—Signals.—In an action for damages occurring at a railway crossing, the testimony of witnesses who were in a position to hear, that they heard no crossing signal, and of another that he did hear signals, creates a conflict of evidence which it is the province of the jury to determine.—Selensky v. Ry. Co., 113.

EVIDENCE Continued

Positive and Negative Testimony.—The testimony of witnesses that they did not hear a signal, who have the same opportunity for observation as those who say the signal was given, is not negative but positive, and entitled to equal weight with the affirmative statement.—*Idem*.

Agency.—In a suit to recover for a binder shipped in care of a third party, it is competent for the purpose of establishing agency in the third party, to show that he had handled plaintiff's machines and had sold them and taken notes in settlement payable to plaintiff.—*McCormick Harvesting Machine Co. v. Lambert*, 181.

Authority of Agent.—Notice.—In the sale of a binder shipped to defendant in care of a third party on condition that it should be given one day's trial, and if it failed to work well immediate notice should be given plaintiff or its agent, the evidence on the question of agency of the third party is considered and held sufficient to warrant the jury in finding that such third party was authorized to receive notice of the failure of the binder to work.—*Idem*.

Same.—The fact that men came to repair a machine in response to notice given the agent of its failure to work, is sufficient evidence of the agent's authority, in the absence of a contrary showing.—*Idem*.

Arrest.—Damages.—In an action for an illegal arrest plaintiff may show in aggravation of damages that he was arrested in the presence of his family.—*Young v. Gormley et al.*, 372.

Attachment.—Statement of Creditor.—Where a wrongful attachment is an issue and malice is alleged, a conversation with the creditor at the time the debt was incurred regarding the date of payment is admissible.—*Lord, Owen & Co. v. Wood*, 303.

Statements of Attorney's Clerk.—The statement relating to the ground of an attachment of a clerk employed in an attorney's office, who has actual charge of the collection of the account and who authorizes the attachment, which is subsequently approved by the attorney, is admissible against the client in a suit for wrongful issuance and levy of the writ.—*Idem*.

Admissibility.—In defense to an action to establish a note as a claim against an estate, the executor testified that when the note was presented claimant stated that he had personal property belonging to deceased which he would turn over if the note were allowed, if not he should keep it. was properly stricken out as tending to inject a new issue.—*Curd v. Wisser et al.*, 743.

Admission.—Error in the exclusion of evidence is cured by the subsequent admission of testimony covering the same point.—*Meyer v. Baird et al.*, 597.

Motion to Strike.—Where evidence is admitted without objection, a motion at the close of all the testimony to strike certain portions, comes too late.—*Slatterly v. Slatterly et al.*, 717.

EVIDENCE Continued

Admission of Cash Book.—In a replevin action based on the fraud of the purchaser of the goods, his cash book, made up from memoranda of sales and disbursements, is admissible to show in a general way the character and extent of his business, though such memoranda is not produced and the entries in the cash book are not verified by the party making them, and this is true even though a trustee in bankruptcy has been substituted as a party defendant.—*Kuh, Nathan & Fisher Co. v. Glucklick et al.*, 504.

Burden of Proof.—Where the plaintiff relies on a letter claimed to have been written by defendant as his authority to make a contract for the sale of her land, and the only evidence of its genuineness is the testimony of witnesses that they are accustomed to comparing signatures and that the handwriting on the envelope containing the letter is the same as the signature of defendant affixed to other instruments, and where defendant denies having written the letter or having knowledge thereof, there is a failure to sustain the burden of proof cast upon the plaintiff to establish his agency.—*Darr v. Darrow*, 29.

Exclusion of Evidence.—Error in exclusion of evidence is cured by the subsequent admission of same; and a party cannot complain of the exclusion of evidence which his own objection has assisted in keeping out of the record.—*Ley v. Ins. Co.*, 203.

Good Faith of Assured.—In an action on an insurance policy, where the company pleads fraudulent representations of the assured in procuring the same, which, if known to the applicant to be false would avoid the policy, the evidence is considered and held sufficient to warrant the conclusion that assured acted in good faith in making the representations.—*Idem*.

Exclusion of Evidence—Error—Cured by Verdict.—In an action for fraudulent representations error in the exclusion of evidence in support of a counterclaim for damages for the wrongful issuance of an attachment based on non-residence, where the ground for the attachment is admitted, is cured by a verdict for the plaintiff.—*Riley v. Bell*, 618.

There is no prejudicial error in sustaining objections to questions which are afterwards substantially answered by the witness.—*Powers v. Benson et al.*, 428.

Where evidence is admissible for a certain purpose, the fact that the court in the absence of a request does not limit its application by an instruction, is not prejudicial error.—*Kircher v. Town of Larchwood*, 578.

Objection—When to be Made.—Objection to a portion of the answer of a witness which is not responsive cannot be first raised on appeal.—*Germinder v. Ins. Ass'n et al.*, 614.

Value—Separate Items.—An objection to a question calling for the reasonable value of property which enumerates the separate parts but omits a material item, or where the witness has already given the value of the separate parts, should be sustained.—*Idem*.

EVIDENCE Continued

Prejudicial Cross-Examination.—In an action on an insurance policy where it is claimed that plaintiff set the fire, it is error to permit a material witness for the defense to be asked on cross-examination if he had not been accused of burning a barn.—*Idem*.

Conclusion of Witness.—In an action for injuries sustained while crossing a bridge, a witness should not be permitted to state as a conclusion whether there was another crossing plaintiff might have gone over "without any trouble," and such testimony is also improper where there is no showing that the same is a public way or known to plaintiff.—*Perry v. Clarke County*, 96.

Conclusion of Witness.—An ordinary witness should state only facts, and an inference or conclusion as to what the witness did should be stricken out.—*Sachra v. Town of Manilla*, 562.

Competency of Witness.—A witness who dissected a horse, though not a veterinary, but who states that from experience he is able to say whether the organs of the animal were in normal condition, is competent to give his opinion on that subject.—*Wisecarver v. Long & Camp*, 59.

Improper Objection.—The relevancy of testimony cannot be considered on an objection which simply goes to the competency of the witness.—*Commission Co. v. Elwood*, 632.

Non-Prejudicial Evidence.—The admission of the testimony of a witness as to his understanding of an agreement is not error where no prejudice results.—*Idem*.

Continuance.—A motion for continuance may be offered and read in evidence.—*Halley v. Tichenor*, 164.

Claim Against Estate.—In an action to establish a note against the estate of decedent, there was evidence tending to show that the note was written on a single sheet of paper, that it was executed by deceased, the mother of plaintiff and her husband, and delivered to a third person for plaintiff's use, but afterwards, on plaintiff's order, was delivered to his father, and while in his possession the signatures were severed from the body of the note, the several parts being left in the desk where the same was kept. Held sufficient to support a verdict for plaintiff.—*Curd v. Wisser et al.*, 743.

Communications With Deceased.—In an action to establish a note as a claim against an estate, evidence by a joint maker that deceased signed the note is inadmissible, under Code, section 4604, though when stricken out is harmless, but evidence that the payee ordered delivery of the note to the surviving joint maker and that it was afterwards in his possession is admissible.—*Curd v. Wisser et al.*, 743.

Personal Transaction.—The testimony of a daughter as to what she did with her personal earnings during her father's lifetime is not objectionable as relating to a personal transaction with deceased.—*Kirsher v. Kirsher*, 337.

EVIDENCE Continued

Transaction With Deceased Person.—Where defendant is sued on a note given to one since deceased, he is an incompetent witness on the question of want of consideration for the note, under Code, section 4604.—*Luke v. Koenen*, 103.

The fact that a physician in testifying to the insanity of testator was mistaken as to the time he treated him merely affects the value of his testimony.—*Kirsher v. Kirsher*, 337.

Commissions—Bad Faith of Principal.—In an action by an agent for commissions for the sale of goods, where it is claimed that the principal was to accept and fill all orders from persons having a certain rating, but that he acted in bad faith in refusing to fill certain orders, it must appear, in order to bind the principal, that the credit rating of such rejected customers was one known to and in use by the defendant, and private information obtained by the agent as to the responsibility of such customer is inadmissible for the purpose of establishing bad faith.—*Wolfson v. Allen Bros*, 455.

Custom—Motion to Strike.—A party cannot permit evidence of a local custom to be received without objection and afterwards have it stricken on motion.—*Commission Co. v. Elwood*, 632.

Damage to Crops.—In an action on a hail policy one of plaintiff's witnesses on cross-examination stated the average yield of his own corn, and on redirect, without objection, that it was injured by hail. Held, not error to permit him to state that it was injured by the same storm which damaged plaintiff's crop.—*Condon v. Hall Ins. Ass'n*, 80.

Declarations of Present Pain.—In a personal injury action, declarations of plaintiff regarding present pain are competent.—*Hamilton v. Coal & Mining Co.*, 147.

Custom.—Evidence as to custom of height and width of entries to mines in the same district is admissible.—*Idem*.

Pain and Suffering.—In an action for an injury caused by a defective sidewalk, the plaintiff, under a general allegation that by reason of the injury he suffered great bodily pain, may show that his kidneys had become somewhat affected by his confinement.—*Kircher v. Town of Larchwood*, 578.

Declarations of Donor.—Subsequent declarations of the donor, not a part of the *res gestae*, are inadmissible to show that a conveyance to a son is a gift rather than an advancement.—*Ellis et al. v. Newell*, 71.

Gift.—In a suit for partition, the widow of intestate, who is a party thereto, is an incompetent witness to show that a transfer to a son was a gift rather than an advancement.—*Idem*.

Dedication.—Intention to dedicate land to a public use may be inferred from its shape, dimensions, situation, etc., but the evidence fails to bring this case within the rule.—*Coe College v. City of Cedar Rapids*, 541.

EVIDENCE Continued

Dedication.—Evidence considered and held insufficient to show a common law dedication of a street.—*Idem*.

Deeds—Execution.—In an action for the possession of real property which plaintiff claimed by deed from her children, the evidence is considered and held sufficient to show that plaintiff's son, the deceased husband of defendant, joined in the deed.—*Slatterly v. Slatterly et al.*, 717.

Discharge of Employee.—It is improper to permit defendant on a counterclaim for wrongful garnishment to testify that it is the practice of his employer to discharge employees who suffer a garnishment of their wages, there being no allegation of discharge and no showing that plaintiff knew of this practice.—*Insell v. Kennedy*, 234.

Expert Testimony.—Experts, as a rule, cannot give an opinion as to the proximate cause of an injury. What caused the injury is for the jury to determine, but what may or may not have caused it is the subject of expert testimony.—*Sachra v. Town of Manilla*, 562.

Expert Testimony.—The value of expert testimony in response to hypothetical questions depends solely upon the truth of the facts on which they are based, and if the facts are not as stated in the questions the answers cannot be considered at all, and an instruction which permits the consideration of expert testimony without regard to this rule, is erroneous.—*Kirsher v. Kirsher*, 337.

Non-expert Opinion.—A witness who has seen and observed the deceased, may, after giving the facts upon which he based his opinion, state that "he was insane."—*Idem*.

Expert Testimony—Objection.—An objection that evidence is incompetent because "measuring degrees of care" will not support a contention that the matter inquired about was not a subject of expert testimony.—*Hamilton v. Coal & Mining Co.*, 147.

Same.—In an action for a personal injury in a coal mine entrance, a witness was asked "Can you, from your experience, find out all about your entry in one or two trips?" An objection that the same does not call for a custom or use does not go to its competency as expert testimony.—*Idem*.

Evidence in Chief—Admissible to Contradict.—The evidence in chief of a witness that immediately after an accident he accused the conductor of a failure to sound the crossing signal, to which no response was made, is admissible to contradict the conductor in case he should testify that the signal was given, if guarded by proper instructions.—*Selensky v. Ry. Co.*, 113.

False Representations.—On the issue of fraud in procuring a mortgage given for the difference in value on exchange of properties, the evidence is examined and held to show that the execution of the mortgage was induced by the fraudulent representations of the mortgagees and their agent, who was also secretly acting as the agent of the mortgagor.—*Brown v. Holden et al.*, 191.

EVIDENCE Continued

Fraud of Purchaser.—A trustee in bankruptcy takes only such title to the property as the bankrupt had, and in an action against the trustee for the possession of goods sold the bankrupt on the strength of his fraudulent representations as to his financial condition, the petition in bankruptcy and schedules attached are admissible to show the fraud.—*Kuh, Nathan & Fisher Co. v. Glucklick et al.*, 504.

Fraud.—In an action to rescind a contract for the exchange of lands, the evidence is held to show that defendant's statements that the title was good, were false, made with intent to deceive and were relied upon by plaintiff.—*Campbell v. Spears*, 670.

Fraud—Laches.—In an action to rescind a contract for the exchange of lands on the ground of fraud, the evidence is considered and it is held under all the circumstances that plaintiff was not guilty of laches in bringing his action and that the same was not barred.—*Idem*.

Fraud—Sufficiency of Proof.—To avoid a policy of insurance on the ground of fraudulent representations by assured, it is not only necessary to show the fraud, but that the company was deceived thereby and relying upon the truth of the representations issued the policy and the proof must be clear.—*Ley v. Ins. Co.*, 203.

Same.—In an action on an insurance policy where the company pleads fraud in defense, it is not only required to prove the making of the false representations, but also that they were known to the assured to be false, and an instruction stating this rule is correct.—*Idem*.

Failure to Prove Title.—In an action to quiet title, where neither party shows any right in or title to the land, but it appears that title was quieted in plaintiff as to a part thereof in a former action, it is not error to deny plaintiff further relief.—*Smith, et al., v. Thomas*, 12.

Financial Responsibility.—For the purpose of establishing the financial standing of parties it is incompetent for a witness to testify to their reputation, and in the absence of knowledge, except that gained from general reputation, a witness is incompetent on the question of the financial responsibility of another.—*Wolfson v. Allen Bros.*, 455.

Garnishment—Fraudulent Concealment of Property.—The evidence in a garnishment proceeding of the wife as having in her possession moneys and credits belonging to the judgment defendant, her husband, considered, and held to show that the notes in the hands of the garnishee were the property of defendant and subject to garnishment.—*Dunning v. Bailey et al.*, 729.

Hypothetical Questions.—Hypothetical questions need only be based on what the evidence substantially shows.—*Kirsher v. Kirsher*, 337.

EVIDENCE Continued

Intent.—In a prosecution for assault with intent to commit murder, a specific intent to kill must be proven. Evidence in the case considered and held to show such intent.—*State v. Hoot*, 238.

Insurance—Promise to Pay.—In an action on a fire policy, where the plaintiff alleges that an adjuster agreed to pay a certain sum in a specified time after proof of loss and no objection to the plea is made, but defendant admits the making of proper proofs of loss, admission of evidence of the adjuster's agreement to pay is not error.—*Germinder v. Ins. Ass'n et al.*, 614.

Instinct of Self Preservation.—A presumption of the exercise of the instinct of self-preservation does not constitute affirmative evidence of the existence of facts prior to and remote from the time of the accident.—*Ames et al. v. Transit Co.*, 640.

Intoxicating Liquor—Burden of Proof.—In an action by the wife for damages for the sale of liquor to her husband, where the seller relies as a defense on a compliance with the mulct law, he has the burden of alleging and proving such compliance.—*League v. Ehmke*, 464.

Prior Intoxication.—In an action by the wife for the sale of liquor to the husband, evidence of the extent of the husband's drinking at a time long prior to that covered by the action, is immaterial.—*Idem*.

General Conduct—Non-Expert Testimony.—Evidence of the general conduct of plaintiff's husband during the period covered by the action, and an opinion as to intoxication by a non-expert who details the facts, are properly admissible.—*Idem*.

Loss of Time.—Evidence in an action for injuries received by a defective sidewalk examined and held sufficient to take the case to the jury on the question of damages for loss of time.—*Sachra v. Town of Manilla*, 562.

Negligence—Personal Injuries.—In an action for the death of a fireman who left his cab and was at work about the engine in the switch yards of defendant when he was struck by another switch engine and killed, the evidence is considered and held that no negligence on the part of the defendant was shown.—*Brown v. Railway Co.*, 280.

Nuisance.—Evidence that defendant maintained a dumping ground for garbage, manure and other refuse, near plaintiff's dwelling, causing a stench and that there had been several cases of fever in plaintiff's family during the time same was maintained, is considered and held sufficient to support a finding that the place was a nuisance.—*Percival v. Yousling*, 451.

Oral Agreement.—In an action for commissions for the sale of land it is not error to permit evidence of what took place at a public sale of the land, at which time it was alleged the parties made the oral agreement sued on.—*Borden v. Isherwood*, 677.

EVIDENCE Continued

A bill of sale cannot be shown to be in fact a mortgage except upon clear and satisfactory proof.—*Powers v. Benson et al.*, 428.

Latent Ambiguity.—Parol evidence is admissible to explain latent ambiguities arising from a testator's contract regarding his property.—*Frahm et al. v. Steffen et al.*, 85.

Proof of Letter.—The fact that defendant addressed an envelope is not sufficient proof that she wrote or had a knowledge of the contents of the letter contained therein. Especially is this true where defendant denies having written the letter.—*Darr v. Darrow*, 29.

Reputation.—A question calling for the general reputation of plaintiff in the community where he lives, is proper.—*Halley v. Tichenor*, 164.

Replevin—Right to Possession.—Where the plaintiff in a replevin action bases his right to possession on ownership, a previously executed mortgage on part of the property is inadmissible to establish right of possession.—*Powers v. Benson et al.*, 428.

Right of Way—Presumption as to Width.—In the absence of proof to the contrary a railway company will be presumed to have appropriated a right of way of the maximum statutory width, but this presumption simply casts the burden on one asserting the contrary and may be overcome by evidence rebutting the inference.—*Canning Co. v. Ry. Co.*, 724.

Sale of Land—Statute of Frauds—Change of Possession.—Where a tenant in possession under a lease claims to have made an oral contract of purchase, mere proof of the making of improvements by the tenant, unaided by other competent evidence, will not establish a change of possession as lessee to that of a vendee so as to take the case out of the statute of frauds and place it within the exception provided by Code, section 4626.—*Allen v. Bemis*, 172.

Self-Serving Declaration.—A writing, the relevant portion of which is a self-serving declaration, is inadmissible.—*Luke v. Koenen*, 103.

Statements of Husband.—In a suit by the grantor to reform a deed, statements of the grantee's husband, made after the transaction, are inadmissible, where there is no showing of authority to speak for grantee.—*Montgomery v. Mann*, 609.

Mutual Mistake.—Evidence in a suit to reform a deed so that coal in the land shall be reserved to the grantor considered and held insufficient to show mutual mistake.—*Idem*.

Sales—Car Load Lots—Burden of Proof.—Where the contract between the manufacturer and his agent provided that the agent should be paid commissions on his approved sales, but the sales must amount to car load lots; held, in an action by the agent for his commissions on orders not filled that the burden was on him to show such orders to the amount of a car load.—*Wolfson v. Allen Bros.*, 455.

EVIDENCE Continued

Secondary Evidence.—In an action partially based on three letters, two of which defendant admitted in his answer, and his testimony as to the contents of the third was substantially as set out in the petition, the fact that the court permitted evidence of their contents without a formal notice to produce, was harmless error.—*Borden v. Isherwood*, 677.

Streets.—In an action for injuries sustained by reason of a defective sidewalk, it is sufficient to show that the way had been used by the town for many years as a public thoroughfare and that the town had assumed and exercised control over it, to fix its character as a public street.—*Kircher v. Town of Larchwood*, 578.

Resulting Trust.—Evidence that a son to whom land was conveyed by the father in fact paid no consideration, never had possession except as tenant, that the father managed it, made improvements, rented it, caused it to be assessed to him, mortgaged it and had possession of the deeds at the time of his death, is insufficient to establish a resulting trust in favor of the heirs of the father, and parol evidence is not admissible in such a case to show want of consideration to defeat the beneficial use expressed in the deed.—*Luckhart v. Luckhart*, 248.

Express Trust.—Parole evidence is not admissible to establish an express trust in land.—*Idem*.

Resulting Trust—Parole Evidence to Establish.—Where the title to real property purchased in a partnership transaction is taken in the name of one of the partners, there is a resulting trust in favor of the partnership which may be shown by parol, so that the same may be charged with the interest of the partnership.—*Kringle v. Rhomberg et al.*, 472.

Want of Consideration—Burden of Proof.—Under Code, section 3069, both a note and a deed import a consideration, and the burden is on the party affirming want of consideration for either to show it.—*Luke v. Koenen*, 103.

Want of Consideration—Failure of Proof.—The fact that defendants testify that the \$1,200 note and conveyance of eighty acres of land in question by them to plaintiff's intestate, were given to defeat the collection of a claim for \$56 against one of defendants, then in litigation, is insufficient to show that the note and deed were without consideration.—*Idem*.

Waiver.—Evidence in the case considered and held to warrant the jury in finding that the company, by its acts and conduct, waived the provision that if additional insurance were effected without consent of the company, it would avoid the policy.—*Lutz v. Ins. Co.*, 136.

Failure of Warranty.—Evidence in an action to recover the price of an ice plant installed in a creamery building under a contract of warranty providing for a trial, and if found to comply with the warranty the purchaser should accept it, is consid-

EVIDENCE Continued

TO

FRAUD

ered and held to show failure of the warranty and that the plant was never accepted.—*Mfg. Co. v. Creamery Co.*, 584.

Withdrawal of Evidence—New Trial.—Upon the trial plaintiff offered in evidence a transcript of the testimony of certain witnesses on a former trial, which was withdrawn, and the same witnesses were examined on the same subject in open court. Held, it appearing that defendant was not prejudiced thereby it was not error to refuse to discharge the jury and grant a new trial.—*Bell v. Town of Clarion*, 332.

EXECUTORS—See **ESTATES OF DECEDENTS**.

FALSE REPRESENTATIONS.

Mortgage.—On the issue of fraud in procuring a mortgage given for the difference in value on exchange of properties, the evidence is examined and held to show that the execution of the mortgage was induced by the fraudulent representations of the mortgagees and their agent, who are also secretly acting as the agent of the mortgagor.—*Brown v. Holden*, 191.

Reliance Upon False Statements.—In a suit by a purchaser against an agent for falsely representing the title to land he is selling, the agent cannot be heard to say that the purchaser had no right to rely thereon.—*Riley v. Bell*, 618.

Fraud of Agent—Recovery—Reasonable Care.—Where one has been induced to purchase land by the willful misrepresentations of an agent as to the title, a showing that the purchaser acted as a reasonably prudent man is not a condition precedent to his recovery from the agent for the injury done.—*Idem*.

Sale of Land—Liability of Agent.—Where an agent for the sale of land willfully misrepresents the title, and the purchaser, relying upon his statements, is induced to purchase without examination of the title and is defrauded thereby, the agent cannot avoid liability for the loss on the ground that he was acting in a representative capacity, and an instruction embodying this rule is correct.—*Riley v. Bell*, 618.

Conveyance of Land—Evidence.—In an action to rescind a contract for the exchange of lands, the evidence is held to show that defendant's statements that the title was good were false, made with intent to deceive and were relied upon by plaintiff.—*Campbell v. Spears*, 670.

FRAUD.

Fraud of Purchaser—Replevin.—In a replevin action by the seller alleging generally that the goods were purchased through false representations, made by the purchaser, of his financial condition, the written statement of the purchaser showing his condition, made at the seller's request, is admissible, and in such an action proof of fraud is a part of plaintiff's main case.—*Kuh, Nathan & Fisher Co. v. Glucklick et al.*, 504.

FRAUD Continued

TO

GARNISHMENT

Principal and Surety—Fraud in Securing Signature of Surety—Defense.—Where a surety signs the note of the principal on the representation that its proceeds are to be applied to the purchase of specific property, when he intends and in fact uses the same in payment of an antecedent debt, the surety may defend a suit on the note on the ground of fraud, and it is error to strike from the answer allegations of fraud.—*Harworth v. Crosby et al.*, 612.

Estates of Decedents—Widow's Allowance.—The statement of a widow in her application for the allowance of a year's support, alleging that her husband died intestate when in fact he left a will, does not amount to fraud, where the other allegations are substantially correct.—*Busby v. Busby et al.*, 536.

Concealment of Property.—Where it is claimed that property sought to be reached by garnishment, was transferred by the judgment debtor to his wife, in fraud of creditors, and there is evidence of a conveyance of real property from a son to the wife at about the same time, an instruction permitting the jury to consider the same as bearing on the good faith of the transfer to the wife, is proper.—*Dunning v. Bailey et al.*, 729.

Possession—Disturbance of.—In an action to set aside a deed on the ground of fraud and failure of title, where it appears that plaintiff never took actual possession, the fact that his possession was never disturbed, is no defense.—*Campbell v. Spears*, 670.

GARNISHMENT.

Fraudulent Concealment of Property.—The evidence in a garnishment proceeding of the wife as having in her possession moneys and credits belonging to the judgment defendant, her husband, considered, and held to show that the notes in the hands of the garnishee were the property of defendant and subject to garnishment.—*Dunning v. Bailey et al.*, 729.

Gifts.—Where the wife, a garnishee under a judgment against the husband, expressly denied in a former suit ever owning any notes given her by her son, and there was evidence that the notes were the property of the husband, the wife cannot defeat the garnishment on the ground that the transaction amounted to a gift from defendant either to her or the son; and this is especially true when first suggested on appeal.—*Idem*.

Exoneration of Garnishee.—Where a garnishee after notice treats property of the judgment debtor in his hands as his own, he is not entitled to a discharge on offering to deliver the property but is liable to a judgment for the value of the property in his hands.—*Idem*.

Insufficient Notice.—Where a judgment against a garnishee is entered upon an insufficient notice to the judgment defendant, the same is premature, if not void, for want of jurisdiction and should be set aside.—*Streeter v. Gleason*, 703.

GARNISHMENT Continued

TO

GUARDIAN AND WARD

Garnishee—Judgment Against.—Judgment on the answer of a garnishee admitting an indebtedness to become due at a future time, is unauthorized prior to the time the liability becomes fixed.—*Idem*.

Same.—Where the garnishee in his first answer admits liability, but in a second, relating to the same debt and same judgment debtor shows that the same is conditional, judgment should not be entered, and if entered will be set aside on motion.—*Idem*.

Liability of Garnishee.—To charge a garnishee upon his answer alone, his liability should clearly appear.—*Idem*.

GIFT—See **ADVANCEMENT**—**EVIDENCE**.

GOOD WILL.

Good Will—Defined.—The good will of a business is defined to be "the advantage or benefit which is acquired by an establishment beyond the mere value of the capital stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity."—*Millspaugh Laundry v. First National Bank*, 1.

To What Attaches.—Good will is not necessarily connected with the premises where the business is carried on, but is identified with the enterprise itself.—*Idem*.

Conversion of Good Will.—The name under which a laundry business is run is connected with its good will, but where a mortgage covering all of the tangible property in connection with a laundry operated under the name "Millspaugh Laundry" is legally foreclosed and the property purchased by the mortgagee and the business afterwards conducted by it in the same place under the title "National Laundry, formerly owned by Millspaugh," there is no conversion of the good will by such use of the name.—*Idem*.

Same.—Continuing the business at the same place by the purchaser at a mortgage sale of the tangible property used in connection therewith, and soliciting the customers of the former proprietor, do not constitute a conversion of the good will.—*Idem*.

GUARDIAN AND WARD.

Accounting.—C, as guardian of a minor, received \$787.07, and thereafter was removed and defendant appointed, who was C's general attorney and who admitted shortly before C's death that he held \$980 of the minor's money. As attorney for C, defendant was entitled to charge five per cent. on moneys collected and disbursed by him, and after C's death defendant rendered an account as such attorney, which showed a balance of \$203.74, which amount being insufficient to pay his commissions, defendant credited himself with \$980.00 paid the minor's

GUARDIAN AND WARD

TO

INSTRUCTIONS

estate as returned, and from the balance deducted \$900 commissions, and paid C's executor the balance. On an accounting of his acts as guardian, defendant was properly required to pay over the funds of his ward, although he claimed to be unable to find where the same had been invested by C.—In re Lewis L. Gray, 144.

Guardianship—Authority for Appointment.—The fact that a man seventy-five years of age; owing to temperament and immoral habits, may develop a disposition to squander his property, while in his business affairs he has been and still is ordinarily prudent and thrifty, will not warrant the appointment of a guardian for him as a person of unsound mind, under Code, section 3219.—Schick v. Stuhr, 396.

Same.—The fact that one of high temper and immoral tendencies may commit wrongs rendering him liable to respond in damages will not authorize the appointment of a guardian, as his estate would be equally as liable in the hands of a guardian.—*Idem*.

Allowance for Support—Fraud and Collusion.—In general a parent is not entitled to an allowance from a ward's funds for its support, but where an allowance is made by the probate court on application, the same is presumed to be correct and will be sustained unless fraud is shown. Evidence in the case examined and held to show fraud and collusion between the parent and guardian.—In re Guardianship of Carter et al., 215.

GUARANTEED STOCK—See BUILDING AND LOAN ASSOCIATIONS.

INCLUDED OFFENSES—See CRIMINAL LAW.

INDICTMENT.

Intoxicating Liquors—Place of Sale—Indictment.—In a prosecution for maintaining a place for the illegal sale of liquor, it is not necessary that the indictment negative defendant's right to sell or specify the violations of the law.—State v. Donahue, 154.

INNOCENT PURCHASER—See MORTGAGES.

INSTRUCTIONS.

Assumption of Risk—Instruction.—Where one is injured by a mail pouch thrown from a moving car, while standing on a station platform at a place other than that at which he knows the pouch is usually thrown, he does not assume the risk, and there is no occasion to instruct the jury with reference to assumption of risk as distinct from contributory negligence.—Carver v. Ry. Co., 346.

Conflict in Evidence—Remarks of Counsel.—An instruction which assumes that certain evidence is undisputed, when in fact there is a conflict, or one directing the jury to disregard statements of counsel made in argument where it appears they were made in response to opposing counsel, should be denied.—Hamilton v. Coal & Mining Co., 147.

INSTRUCTIONS Continued

Consideration of Instructions by Jury.—A direction to the jury to consider each instruction in the light of, and in harmony with every other instruction given, is commended, and is not subject to the criticism that it is liable to confuse.—*Lampman v. Bruning*, 167.

Damages.—In a suit for damages for an assault, an instruction based on sufficient evidence that if defendant attempted to ride his horse upon or against plaintiff, whereupon defendant, acting as a reasonable man, armed himself with a stick to ward off the attack, and thereby plaintiff's horse was frightened and he received the injuries complained of, then defendant is not liable for damages, is correct.—*Halley v. Tichenor*, 164.

Damages—Loss of Time.—In an action for personal injuries, an instruction that plaintiff should be allowed the value of his time while disabled is more favorable than defendant is entitled to, as he is entitled to compensation for loss of time while only partially disabled.—*Sachra v. Town of Manila*, 562.

Exemplary Damages.—Where the verdict is against a claim for exemplary damages, error in instructing on the claim, is harmless.—*Meyer v. Baird et al.*, 597.

Fraud—Evidence.—Where it is claimed that property sought to be reached by garnishment was transferred by the judgment debtor to his wife in fraud of creditors and there is evidence of a conveyance of real property from a son to the wife at about the same time, an instruction permitting the jury to consider the same as bearing on the good faith of the transfer to the wife, is proper.—*Dunning v. Bailey et al.*, 730.

Failure to Sign.—Failure of the trial judge to sign his instructions in a civil case does not constitute reversible error.—*Halley v. Tichenor*, 164.

Damages.—In an action for damages for an assault, where there is no evidence of the physician's charges or the value of time lost, an instruction that no damage should be allowed on account thereof, is proper.—*Idem*.

Garnishment—Property of Husband in Wife's Name.—Where the wife is garnished as the supposed debtor of the husband, an instruction that if the garnishee had no property of her own, and property which originally belonged to her husband and in his name was transferred to his son and that such property, or a note given therefor, was taken in the name of the garnishee, for which she gave no consideration, the same was liable for her husband's debts, was proper.—*Dunning v. Bailey et al.*, 729.

Insurance—Fraud.—Where the defense to a suit on an insurance policy is fraud, an instruction "that if the facts upon which the fraud is charged are or may be consistent with honesty and purity of purpose then the charge of fraud will fail" is not objectionable as confusing, or as doubtful whether the words "facts charged" refer to the facts as alleged or the evidence.—*Ley v. Ins. Co.*, 203.

INSTRUCTIONS Continued

Same.—In an action on a policy of insurance where fraud is pleaded in defense, an instruction that "to show fraud the facts must lead naturally and clearly to the facts sought to be established, and must be inconsistent with any other reasonable or probable theory" is not erroneous, where the court in the same paragraph states that only a fair preponderance of the evidence is required to establish the defense.—*Idem.*

Intoxicating Liquors.—In an action for damages for the sale of liquor, where there is no evidence that defendant was lawfully selling under the mulct law, the court is not required to submit a defense made only by the pleadings, that defendant was operating under the law.—*League v. Ehmke*, 464.

Habitual Intoxication—Pleadings.—An instruction authorizing recovery of damages by the wife, caused by the husband's habitual intoxication to which defendant contributed, is not erroneous, as being broader than the allegations of a petition charging that defendant caused the habitual intoxication of plaintiff's husband.—*Idem.*

Sale to Habitual Drunkard.—In an action for injury caused by the sale of liquor to an habitual drunkard, an instruction that if defendant caused or contributed to the continuance of the habit of becoming intoxicated, or being habitually intoxicated, he is liable so far as his acts contributed thereto, is correct.—*Idem.*

Threats Resulting From Intoxication.—In an action by the wife for damages for the sale of liquor to the husband, an instruction that if defendant contributed to the husband's habitual intoxication, of which the particular intoxication at the time he threatened plaintiff with bodily injury was a part, they might consider injury to plaintiff's health resulting from such threats in estimating her damages, was not error.—*Idem.*

Habit of Drinking.—In an action under Code, section 2418, an instruction that if defendant caused or contributed to the habitual intoxication of plaintiff's husband, and by reason thereof plaintiff was injured * * * she is entitled to recover, but if defendant merely contributed to the habit of drinking, without intoxication, but leading to the habit which resulted in intoxication, she could not recover, is proper, and recognizes the distinction between causing a habit and causing intoxication.—*Idem.*

Liability of Master.—In an action for damages for the death of an employe engaged in operating machinery, an instruction that "if you find from the evidence that the nut at the end of the shaft in question was in the habit of coming off, or that it was off for hours at a time, or that by reason of such defect the wheel came out, the defendant was guilty of negligence," is misleading and states the rule of the master's liability in the case too narrowly.—*Shebeck v. Cracker Co.*, 414.

Assumption of Risk—Age and Experience.—On an issue of the assumption of risk, age and experience of the servant should

INSTRUCTIONS Continued

be considered in determining whether he knew or ought to have known and appreciated the danger, and failure to instruct upon this branch of the case was error.—*Idem*.

Negligence.—Where the plaintiff was injured while at work in entry to a mine, by a rock projecting from the ceiling of the passage, the court cannot say as a matter of law that the injury was the result of his negligence, but it is a case for the jury to determine from all the circumstances.—*Hamilton v. Coal & Mining Co.*, 147.

Negligence.—An instruction which assumes that plaintiff knew that the view of an approaching train was obstructed and therefore it was her duty to stop and look and listen, where from the evidence such obstruction is an open question, should not be given.—*Selensky v. Ry. Co.*, 113.

Special Instruction.—A special instruction which is sufficiently covered by the general instructions need not be given.—*Idem*.

Negligent Use of Team.—In an action for injury to a hired team, the court instructed that plaintiff must show both defendant's negligence and that such negligence was the direct cause of the injury, irrespective of the condition of the team before or after making the trip. Held, not erroneous as withdrawing from the jury evidence of the condition of the team on its return.—*Wisecarver v. Long & Camp*, 59.

Want of Care.—In an action for injuries to a hired team, refusal to instruct in substance that if the evidence discloses that the team was injured while in defendant's possession, from a lack of ordinary care and prudence as shown by its condition when returned, then the plaintiff is entitled to recover, is error, though the time and place where the injury or want of care occurred does not appear.—*Idem*.

Same.—It is error, in an action for injuries to a hired team, to refuse to instruct in substance, that it is the duty of defendant to exercise ordinary prudence and care in driving the team and to observe their condition, and if he failed so to do and negligently drove them until injured, then defendant is liable.—*Idem*.

Negligence.—An instruction that defendant, as a matter of law, was required to keep the entry to its mine of uniform height and width, was properly refused, as any question of negligence in failing to furnish plaintiff a safe place to work was for the jury.—*Hamilton v. Coal & Mining Co.*, 147.

Partnership—Firm Note.—In an action against a former member of a partnership on a note given by the firm, where the defendant pleaded and testified that in adjusting partnership affairs after the dissolution of the old firm, in consideration of defendant's stepping out of the business and turning it over to the new firm, the plaintiff agreed to look to the new firm for payment of the note, it was error to instruct that in order to find for the defendant it must appear that the agreement to release was made at or before the dissolution, as there was no such issue.—*Hamilton v. Smith*, 93.

INSTRUCTIONS Continued

TO

INSURANCE

Permanent Disability—Evidence.—In an action for injuries arising from a defective sidewalk, the plaintiff alleged that the injuries were permanent and was permitted to show his expectancy of life on the statement of counsel that no claim for permanent injury was made but that the evidence was offered to show that plaintiff would probably outlive his disabled condition. Held, error to submit the question of plaintiff's permanent disability, and that the error was not waived by failure to request an instruction.—*Kircher v. Town of Larchwood*, 578.

Stating issues.—The court should so far as possible state the issues in an abbreviated form rather than by substantially setting out the pleadings, as there is less liability to confusion.—*Shebeck v. Cracker Co.*, 414.

Use of Conjunctive "And" For Disjunctive "Or."—In a suit by a vendee against an attaching creditor of the vendor, the error in an instruction that if the parties to the sale intended thereby to hinder, delay "and" defraud creditors, is harmless, where the same instruction in other paragraphs contains the disjunctive "or."—*Meyer v. Baird et al.*, 597.

Withdrawal of Evidence.—In an action against a railway company for killing colts claimed to have wandered onto the right of way over a defective cattle guard, an instruction withdrawing from the jury all questions of negligence in the operation of the train, and directing them to give no consideration to evidence regarding the speed of the train or ability of engine men to observe the crossing, was not misleading, as withdrawing evidence of the engineer as to what he actually saw at the time of the collision.—*Paul v. Ry. Co.*, 224.

Wrongful Attachment.—On an issue for wrongful attachment, an instruction that if the jury find that plaintiff "did not believe or had no reasonable ground for believing" that defendant was about to wrongfully dispose of his property, the attachment was wrongful, and a recovery may be had, is error, as it ignores the fact that defendant must also prove that the ground of the attachment was in fact untrue.—*Lord, Owen & Co. v. Wood*, 303.

If a party desires a more explicit instruction than that given, he should request it.—*Kirsher v. Kirsher*, 337.

INSTINCT OF SELF PRESERVATION—See NEGLIGENCE—EVIDENCE.

INSURANCE.

Contract of Insurance—Where Complete.—Where an application for insurance is taken by a local agent and sent to another state for approval by a general agent, under a stipulation that it should not be binding until there approved, and the approval is there made, except as to the premium, which is increased and the local agent so notified, the contract is not

INSURANCE Continued

complete until such change is agreed to by assured, and in the absence of a showing that he accepts by letter direct to the general agent, the contract will be considered as completed at the place of residence of the local agent.—*Born v. Ins. Co.*, 299.

Same.—Where a contract of insurance is approved in part by the company and a counter proposition made as to that part, it becomes effective by an acceptance of the change by the assured.—*Idem.*

Fraud—Instruction.—Where the defense to a suit on an insurance policy is fraud, an instruction "that if the facts upon which the fraud is charged are or may be consistent with honesty and purity of purpose then the charge of fraud will fail" is not objectionable as confusing, or as doubtful whether the words "facts charged" refer to the facts as alleged or the evidence.—*Ley v. Ins. Co.*, 203.

Same.—In an action on a policy of insurance where fraud is pleaded in defense, an instruction that "to show fraud the facts must lead naturally and clearly to the facts sought to be established, and must be inconsistent with any other reasonable or probable theory" is not erroneous, where the court in the same paragraph states that only a fair preponderance of the evidence is required to establish the defense.—*Idem.*

Hall Insurance—Evidence—Verdict.—In an action on a hall insurance policy plaintiff testified to the acreage of corn and the yield, and stated the amount of damage, while the evidence of defendant's witnesses, based upon measurement of the ground and cribs in which the corn was stored, showed a full yield. Held, the jury was justified in accepting plaintiff's estimate of the loss.—*Condon v. Hall Ass'n.*, 80.

Mutual Benefit Association—After Enacted By-Laws—Effect Of.—It is competent for a mutual benefit association and a certificate holder to contract to be bound by by-laws to be enacted in the future.—*Ross v. Brotherhood of America*, 692.

By-Laws—Reasonableness—Broken Leg.—A by-law defining a broken leg, for which a benefit association shall be liable under its certificate of indemnity, to be breaking the shaft of the thigh bone between the hip and knee joint, or breaking the shafts of both bones between the knee and the ankle joint, is reasonable, and a certificate holder receiving an injury of such character after the adoption of such by-law is bound thereby, where by the terms of the original contract, the parties agree to be bound by future enacted by-laws.—*Idem.*

Mutual Benefit Society—Suspension—Failure to Pay Dues.—A provision in the constitution of a mutual benefit society that a member failing to pay his assessment within fifteen days after being notified by the secretary shall be suspended, is not a self-executing provision, and a member who has failed to pay within the time is still in good standing, no action having been taken to suspend him.—*Jelly v. Ins. Society*, 689.

INSURANCE Continued

Payment of Loss—Waiver—Rights of Mortgagee.—The assured cannot waive the effect of an arbitration of a loss under a policy of insurance, whereby the company elects to pay the loss rather than replace the property, so as to bind a mortgagee to whom the loss was payable.—*Building & Loan Ass'n v. Ins. Co.*, 530.

Proof of Loss—Waiver of—Instruction.—Where plaintiff notifies the insurance company of the loss and it sends an adjuster, who accepts plaintiff's proposition of settlement and promises to report the company's action thereon, and where on renewed demand for settlement the company promises further inspection but fails to make it or notify plaintiff of its acceptance or rejection of his proposition, or to demand proof of loss before maturity of the claim, the company waives its right to require proof of loss.—*Condon v. Hall Ins. Ass'n*, 80.

Same.—Where the insurance company, before suit, notified plaintiff, whose corn was damaged by hail, to send it an account of the acreage covered by the policy and amount harvested, and the assured replied by giving the amount of the loss, to which defendant said it would give the matter attention but failed to do so and denied all liability, it waived its right to demand a further account of the amount harvested.—*Idem*.

Representation of Title.—A statement by assured in his application for insurance that he holds an equitable title, when he in fact has a contract for the land which he has pledged as security for a debt, is not a misrepresentation as to title.—*Born v. Ins. Co.*, 299.

Promise to Pay.—In an action on a fire policy, where the plaintiff alleges that an adjuster agreed to pay a certain sum in a specified time after proof of loss, and no objection to the plea is made, but defendant admits the making of proper proofs of loss, admission of evidence of the adjuster's agreement to pay, is not error.—*Germlinder v. Ins. Ass'n*, 614.

Setting Aside Award—Recovery of Loss.—A suit in equity may be maintained to set aside an award of arbitrators of the amount of loss under a policy of insurance and to recover judgment for the loss.—*Vincent v. Ins. Co.*, 272.

Settlement of Assessment—Forfeiture—Waiver.—An agent of a mutual hail association, authorized simply to collect delinquent assessments, settled with a suspended member by allowing him a claimed loss in part payment and accepting his note for the balance, the proceeds of which he remitted the company, with full information as to the settlement. The company notified the assured that the claimed loss could not be allowed but retained the proceeds of the note, and subsequently notified him that an assessment for another year was due. Held, that the company by its conduct had ratified the act of the agent, which restored the assured to membership and had thereby waived its right to claim a forfeiture of the policy.—*Barrett v. Ins. Co.*, 184.

INSURANCE Continued

TO

INJUNCTION

Waiver of Conditions of Policy.—A provision in a policy of insurance that its conditions cannot be waived except by a writing on or attached to the policy, is subject to waiver by the conduct of the company tending to justify the inference that compliance therewith is not insisted upon.—*Lutz v. Ins. Co.*, 136.

INTOXICATING LIQUORS—See INSTRUCTIONS—EVIDENCE—STATUTES—PRACTICE.

Canvass of Statement of Consent.—Under Code, section 2450, the filing of a general statement of consent to sell intoxicating liquor which is withdrawn, does not preclude the board of supervisors from canvassing another filed during the year. It is the canvass of more than one statement in a single year which is prohibited.—*In re Intoxicating Liquors*, 680.

Canvass of Statement of Consent—Duty of Supervisors.—The duty of a board of supervisors in canvassing a statement of consent to sell intoxicating liquor is to inquire into the sufficiency and genuineness of the names affixed thereto; they are not required to investigate the reputation of the persons making affidavit to the signatures, and when it is stipulated that a statement contains a requisite number of signatures of qualified persons to authorize the board to canvass the same and hold it sufficient, the purpose of the law in this respect is complied with.—*Idem*.

Civil Damages—Burden of Proof.—In an action by the wife for damages for the sale of liquor to her husband, where the seller relies as a defense on a compliance with the mulct law, he has the burden of alleging and proving such compliance.—*League v. Ehmke*, 464.

Indictment.—In a prosecution for maintaining a place for the illegal sale of liquor, it is not necessary that the indictment negative defendant's right to sell or specify the violations of the law.—*State v. Donahue*, 154.

Single Room.—Code, section 2448, which provides that selling or keeping for sale of intoxicating liquors shall be carried on in a single room, does not prohibit an opening into a refrigerator room which cannot be used either as an exit or place for buying or drinking liquor.—*Idem*.

INJUNCTION.

Nuisance—Abatement Of.—The fact that a nuisance may also affect others in the vicinity injuriously will not affect the plaintiff's right to maintain a suit to abate the same, under Code, section 4302.—*Percival v. Yousling*, 451.

Dissolution of Injunction.—Where in a suit to enjoin the issuance of a tax deed the court properly extended the period for redemption at the time a demurrer to the petition was sustained, failure to then dissolve the temporary injunction was without prejudice.—*Blitzer v. Becke et al.*, 66.

An injunction will lie to restrain a town from constructing a sidewalk under a void order and notice.—*Burget v. Town of Greenfield*, 432.

JUDGMENTS

JUDGMENTS.

Decree of Foreclosure—Collateral Attack.—A decree directing sale under special execution of property covered by a chattel mortgage in another county cannot be collaterally attacked, even though the mortgage provides for a sale in the home county.—*King v. Nelson*, 606.

Special Execution—Issuance of.—On the foreclosure of a chattel mortgage, where the petition states the requisite facts, the decree may direct the issuance of a special execution for any part of the property wherever located in the state.—*Idem*.

Enforcement of Judgment.—Although an appeal deprives the district court of jurisdiction of the action, it still has power, on affirmance of its decree, to enforce its judgment by proper orders.—*Dunton v. McCook et al.*, 444.

Discharge of Judgment.—Any one interested in the enforcement of a judgment, having matters of discharge which have arisen since the decree was entered, upon motion, under the statute and in a summary way, may have the same discharged.—*Idem*.

Garnishment—Setting Aside Judgment.—The entry of judgment against a garnishee and approval of the record does not deprive the court of power to set the judgment aside and reopen the proceeding on a motion of the garnishee made at the same term.—*Streeter v. Gleason et al.*, 703.

Same—Insufficient Notice.—Where a judgment against a garnishee is entered upon an insufficient notice to the judgment defendant, the same is premature, if not void for want of jurisdiction and should be set aside.—*Idem*.

Garnishee—Judgment Against.—Judgment on the answer of a garnishee admitting an indebtedness to become due at a future time is unauthorized prior to the time the liability becomes fixed.—*Idem*.

Same.—Where the garnishee in his first answer admits liability, but in a second, relating to the same debt and same judgment, debtor shows that the same is conditional, judgment should not be entered, and if entered will be set aside on motion.—*Idem*.

Right of Way—Decree—Prior Agreement.—Where a railway company has acquired an easement for right of way purposes by a decree in a condemnation proceeding which contains no reservations in favor of the land owner, all prior verbal agreements between the parties concerning the use by the land owner of any part of the right of way are terminated by the decree.—*Railway Co. v. Snyder*, 532.

Right of Way—Possession.—A decree in a condemnation proceeding granting a railway company an easement for right of way purposes over the land of another has the same force as a deed so far as the right to possession and control is concerned, and any subsequent possession by the land owner, in the absence of a showing that his holding is adverse, is subservient to the rights of the railway company.—*Idem*.

JUDICIAL SALE

TO

HIGHWAYS

JUDICIAL SALE.

Title Under Nebraska Law.—Under the laws of Nebraska the title to real estate purchased at an execution sale is not complete until the same is confirmed by the court.—*Hendryx v. Evans et al.*, 310.

Same—When Deed May Issue.—The purchaser at an execution sale in Nebraska, where the sale has been confirmed by the court, is entitled to a sheriff's deed at any time before the filing of a petition in error, notwithstanding the execution of a supersedeas bond, under section 590, Revised Statutes of Nebraska.—*Idem*.

Good Faith Purchaser.—A creditor acquiring a sheriff's deed at a lawful sale is a good faith purchaser.—*Idem*.

Prior Conveyance—Notice.—Where a tenant is in possession of real property under a lease from an administrator, the mere statement to the tenant by the husband of the grantee of one of the heirs that such grantee has purchased the interest of such heir, is insufficient to constitute notice of the grantee's rights in the property to one who purchases the interest of the heir at a judicial sale.—*McCormick v. McCormick Harvesting Mach. Co.*, 593.

JUDICIAL NOTICE.

Streets.—Courts will not take judicial notice of the width of streets in a special charter city where they are not established in the charter, but the same is a matter of proof as though the city were incorporated under the general law.—*Coe College v. City of Cedar Rapids*, 541.

JURISDICTION.

Appeal—Revival of Cause.—The district court loses jurisdiction of the parties and the subject-matter of the suit when an appeal is taken, and upon affirmance of the decree without an order remanding the cause the issuance of a *procedendo* will not revive it.—*Dunton v. McCook et al.*, 444.

Taxation—Appeal From Board of Review—Bond.—Jurisdiction of the district court to review an assessment on appeal from a board of equalization is acquired by service of the notice of appeal, as provided by Code, section 1373, and failure to file a transcript of the proceedings before the board of review until the trial has begun will not oust the court of jurisdiction acquired by the appeal; nor is a bond required on such appeal.—*City of Marion v. Ry. Co.*, 259.

HIGHWAYS.

Right of Way—Designation—Acquiescence.—Where a right of way has been decreed over the lands of another, it is not necessary for the parties to expressly designate its location, but is sufficient if a right of way is used and acquiesced in. Evidence examined and held to show selection and acquiescence with sufficient definiteness.—*Dickinson v. Crowell et al.*, 254.

HOMESTEAD

TO

LANDLORD AND TENANT

HOMESTEAD.

Apportionment of Incumbrance.—An allowance to the widow of one-third of the real estate, including the homestead, and an apportionment of the incumbrance executed by husband and wife so as to leave the homestead free, is proper, though the widow thereby receives more than one-third the net realty.—*Bissell v. Bissell*, 127.

Election—Sale of.—Where the husband, who is made the sole legatee and executor of the will of his deceased wife, completes a sale of her homestead pursuant to a contract made by the wife and the order of court, the same does not constitute an election to take under the will so as to preclude him from electing to take the proceeds of the sale and use the same in the purchase of a new homestead.—*Milner v. Davis*, 231.

Diversion of Proceeds.—The fact that a purchaser of the homestead belonging to the wife under a contract of sale made by her, deposits a portion of the purchase price in a bank to the credit of the husband, who is sole legatee under her will, through an arrangement with the husband to complete the sale, does not constitute a diversion of the fund prior to settlement of the estate so as to deprive it of its homestead character.—*Idem*.

Sale for Taxes.—Under section 876 of the Code of 1873, a homestead not separately listed could be sold for taxes on other property belonging to the same owner.—*Bitzer v. Becke et al.*, 66.

LACHES—See EVIDENCE—LIMITATION OF ACTIONS.

LANDLORD AND TENANT.

Attachment—Counterclaim.—The provisions of Code, section 3880, providing that the petition in landlord's attachment shall state that something is due, has reference to the maturity of the claim for rent and not the balance of indebtedness owing from one party to the other, and the landlord is not precluded from attaching for rent due, by reason of the fact that the tenant has claims against him in excess of the rent.—*Smeaton v. Cole*, 368.

Forfeiture of Lease—Demand for Rent.—Where a lease contains a forfeiture clause in case the tenant fails to pay any installment of rent when due, the forfeiture cannot be enforced and an action of forcible entry and detainer maintained until demand has been made for payment of amount due, and a reasonable time given in which to pay the same.—*Cole v. Johnson*, 667.

Sale of Land—Change of Possession.—Where a tenant in possession under a lease claims to have made an oral contract of purchase, mere proof of the making of improvement by the tenant, unaided by other competent evidence, will not establish a change of possession as lessee to that of a vendee so as to take the case out of the statute of frauds and place it within the exception provided by Code, section 4626.—*Allen v. Bemis*, 172.

LANDLORD AND TENANT Continued TO MASTER AND SERVANT

Payment of rent by a tenant after the alleged oral contract of purchase was made, negatives the idea that his possession was that a vendee.—*Idem*.

Malicious Issuance of Writ.—Where the landlord has a valid claim against the tenant for rent, the fact that the tenant has claims against the landlord in excess of the rent will not justify a conclusion that the landlord was actuated by malice in suing out the writ.—*Smeaton v. Cole*, 368.

Unauthorized Lease—Payment of Rent.—An agent in the absence of express authority cannot make a valid lease of his principal's property to be used for an immoral purpose, and a payment of rent to the agent under an unauthorized lease will not bind the principal.—*Stover v. Flower*, 514.

LARCENY.

Possession of Stolen Property—Instruction.—It is only when the breaking and entering and the larceny are committed at the same time and by the same person, that the recent possession of the stolen property will justify a conclusion that the person who stole the property also did the breaking and entering.—*State v. Williams*, 36.

LIMITATION OF ACTIONS.

Amendment to Petition—New Cause of Action.—In an action for an injury caused by a defective sidewalk, an amendment to the petition alleging merely that the accident occurred at a different place from that originally pleaded, is not the introduction of a new cause of action; and though filed more than ninety days after the alleged injury it relates back to the date of the original petition and the cause of action is not therefore barred.—*Sachra v. Town of Manilla*, 562.

Dower.—The statute of limitations does not commence to run against a wife's right of dower until the death of the husband.—*Lucas v. White*, 735.

Laches—Evidence.—In an action to rescind a contract for the exchange of lands on the ground of fraud, the evidence is considered and it is held under all the circumstances that plaintiff was not guilty of laches in bringing his action and that the same was not barred.—*Campbell v. Spears*, 670.

MALICE—See LANDLORD AND TENANT.

MANDAMUS.

Counties—Repair of Bridges.—Under Code, section 422, mandamus will not lie to compel a board of supervisors to make repairs to county bridges, where, in the exercise of their discretionary power, they have refused so to do.—*Leonard v. Wake-man*, 140.

MASTER AND SERVANT.

Assumption of Risk—Burden of Proof—Instruction.—In an action for injuries resulting in the death of a servant, owing to alleged

defective machinery and negligence of the master to keep it in repair, where the answer alleges that the defective condition of the machinery was known to deceased and that he remained in defendant's employ without objection, the issue of assumption of risk is tendered with the burden upon the defendant, and a general instruction that under the issues the burden is on the plaintiff, is erroneous.—*Shebeck v. Cracker Co.*, 414.

MUNICIPAL CORPORATIONS.

Illegal Arrest—Responsibility of Mayor—Evidence.—In an action against the marshal and mayor of a town for an illegal arrest of one claimed to have interfered with the city officials in their efforts to open a claimed street, the fact that the mayor directed the marshal to protect the street commissioner in opening the street, and when arrested refused to discharge plaintiff and caused him to repeatedly appear for trial, finally informing him there was no charge made, is sufficient to connect the mayor with responsibility for the arrest.—*Young v. Gormley et al.*, 372.

Committee of Council—Acts of.—Where a city council appoints a committee to perform a municipal act, it cannot bind the corporation except upon notice to all its members of the time and place of meeting.—*Burge v. Rockwell City*, 495.

Contract by Committee—Modification of.—A city council appointed a committee of three with full power to procure a water supply for the city, and, if necessary, to sink a well. The committee made a contract for a well of specified dimensions. Subsequently two members, without notice to the third, modified the contract with respect to the diameter of the well. Held, such act was invalid and the contract so modified was not enforceable.—*Idem*.

Bridges—Crossing with Engine.—In a suit for injuries sustained by the breaking of a highway bridge while crossing the same with a threshing engine, where the evidence is in dispute as to whether the wheels of the engine were upon running plank as required by statute, the question presented is for the jury to determine.—*Perry v. Clarke County*, 96.

Defective Bridge—Want of Notice—Negligence.—When a bridge maintained by a county becomes weakened and dangerous from natural decay, which the exercise of reasonable care would have revealed, the county cannot rely upon want of notice to relieve it from liability for injury.—*Idem*.

Repair of Bridges—Mandamus.—Under Code, section 422, mandamus will not lie to compel a board of supervisors to make repairs to county bridges, where, in the exercise of their discretionary power, they have refused so to do.—*Leonard v. Wakeman*, 140.

Notice of Injury—Sufficiency of.—In an action for injuries from a defective bridge, it is only necessary for the plaintiff to file with the county auditor a notice in substantial compliance

MUNICIPAL CORPORATIONS Continued

with Code, section 3447, giving the time, place and circumstances of the injury in reasonably specific terms, to entitle him to bring his action after the expiration of ninety days from the date of the injury.—*Perry v. Clarke County*, 96.

Expense of Disinfecting.—The cost of disinfecting dwellings and contents, of quarantined persons, incurred by a city board of health is not chargeable to the county.—*Schmidt v. Muscatine Co.*, 267.

Disinfecting Pest House.—A county is not liable for the cost of disinfecting its pest house until after notice by the board of health and opportunity to do the work itself.—*Idem*.

Taxation—Discovery of Omitted Property.—A board of supervisors had authority under Code, section 1374, to contract with a party to discover taxable property, which, through fraud or for other cause, had been omitted from taxation.—*Shinn v. Cunningham et al.*, 383.

Construction of Walks—Grade.—Code, section 779, contemplates that permanent walks shall be constructed only at an established grade, and an ordinance and resolution which provide that they shall be so constructed unless otherwise agreed upon by the property owners and a committee of the council are void.—*Burget v. Town of Greenfield*, 432.

Second Walk—Injunction.—Where the proceedings of a town council in ordering the construction of a sidewalk at grade are irregular, but one has been constructed thereunder by the lot owner, though not in conformity with the defective order, he cannot be required to construct another without a new order and notice, and he is entitled to an injunction restraining the town from constructing under the void order and notice.—*Idem*.

Sidewalks.—Where the construction of permanent sidewalks, ordered by a town, interfere with the shade trees of a lot owner, the town is held to a strict compliance with the statute and its ordinances in relation thereto.—*Idem*.

Sidewalks—Notice.—Where an ordinance for the construction of sidewalks requires that notice shall be served on the lot owner by delivering to him a copy of the resolution ordering construction, failure to give such notice will relieve the owner of the necessity of constructing his walk at grade.—*Idem*.

Sidewalk—Grade—Default of Lot Owner.—Where a town, pursuant to Code, section 779, adopts an ordinance providing for the construction of sidewalks at an established grade, before the lot owner can be held in default for failure to construct the walk pursuant to an order of the council, the town must bring the bed of the walk to grade and point out the grade line.—*Idem*.

Defective Sidewalk—Second Action—Pleadings—Diligence.—In a second action for injuries caused by a defective sidewalk, brought after a voluntary dismissal of the first, which is

MUNICIPAL CORPORATIONS Continued

barred unless within the exception provided in Code, section 3455, the plaintiff must state facts showing that the dismissal of the first action was not the result of negligence on his part. Allegations of the petition considered and held insufficient to show diligence.—*Cepriely v. Town of Paton*, 559.

Easement in Street—Estoppel.—Where a grantor sells and conveys lots describing them by metes and bounds, also by reference to the same as designated on a certain plat and represents that the lots are adjacent to a street which he points out on the plat, the grantee takes an easement in the street which the grantor is estopped to deny, even though the plat was not authorized by him, was not legal, and had never been recorded.—*Cleaver v. Mahanke et al.*, 77.

Streets—Evidence of.—In an action for injuries sustained by reason of a defective sidewalk, it is sufficient to show that the way had been used by the town for many years as a public thoroughfare and that the town had assumed and exercised control over it, to fix its character as a public street.—*Kirchner v. Town of Larchwood*, 578.

Street Grades—Damages.—A property owner making improvements prior to the establishment of a street grade cannot recover damages caused by bringing the street to a grade thereafter legally established.—*Wilber v. City of Ft. Dodge*, 555.

Same.—Failure of a city council to adopt a resolution ordering the work of bringing a street to grade, in the absence of an allegation and proof of special damages on account of such failure, will not create a right of action in favor of a property owner for damages resulting in bringing such street to grade.—*Idem*.

Streets—Drainage.—A city may be liable in damages for grading a street, though done in accordance with an ordinance, if thereby the natural drainage is destroyed and no adequate provision is made for disposing of the surface water.—*Idem*.

Plat—Dedication of.—The object of a plat is to avoid complications in conveying small parcels of land, and where a survey and plat are properly made and dedicated, it amounts to a deed in fee simple to those portions therein set apart for public use.—*Coe College v. City of Cedar Rapids*, 541.

Same.—A plat which fails to designate the corners of lots and blocks, the width of claimed streets, to point out the location of a stone as in the street, or name the ground as streets, does not comply with the statute so as to constitute a dedication of the streets.—*Idem*.

Streets—Judicial Notice.—Courts will not take judicial notice of the width of streets in a special charter city where they are not established in the charter, but the same is a matter of proof as though the city were incorporated under the general law.—*Idem*.

MUNICIPAL CORPORATIONS Continued TO

MURDER

Dedication—Description.—A plat of an addition to a city is insufficient to establish the dedication of a street where it fails to disclose the lines, corners and dimensions of the land claimed to have been dedicated. The description must be as definite as is required in a conveyance.—*Idem*.

Sewers—Insufficient Capacity—Damage.—A property owner who voluntarily constructs a sewer from the basement of his building to the city's main sewer, paying the required fee for permission to do so, and knowing that the city sewer is insufficient at times to carry the surface water and sewerage and that other connected cellars near his own had been flooded, has no right of action against the city for damages caused by the flooding of his cellar by backwater from the city sewer.—*Sheriff v. City of Oskaloosa*, 442.

MORTGAGES.

Bona Fide Purchaser—Evidence.—Where one purchases a mortgage, even for value and before due but with a knowledge that the maker claims a defense which has not been waived or satisfied, he does so at his peril, and this is true though the purchase is through an agent having such knowledge. Evidence considered and held to bring the case within the rule.—*Brown v. Holden et al.*, 191.

Foreclosure—Attachment—Defense.—In a suit to foreclose a mortgage, where the mortgagee levies an attachment and the mortgagor pleads a counterclaim in defense, a subsequent owner deriving title from the mortgagor cannot set up the invalidity of the attachment levy against the mortgagee.—*Mercantile Realty Co. v. Stetson et al.*, 324.

Receiver—Filing of Claim—Estoppel.—Where a mortgagee commences foreclosure of his mortgage, issuing an attachment, and afterward a receiver of the mortgaged property is appointed and makes application for an order to sell subject to the mortgages, to which such mortgagee appears, and before an order of sale is granted he files his claim with the receiver, which is disallowed, but an order is granted authorizing an appeal therefrom, the mortgagee thereby elects to rely on his claim against the receiver and is estopped from proceeding against the property on a judgment of foreclosure of his mortgage.—*Idem*.

MURDER.

Assault With Intent to Commit Murder—When Special Instruction Not Required.—On a prosecution for having sent a box containing explosives for another to open, with intent to commit murder, and the jury are told in various instructions that a finding that defendant was in fact the person who sent the box was essential to conviction, it is not necessary, in the absence of a request, to devote a special instruction to that subject.—*State v. Hoot*, 238.

Criminal Intent.—A husband who sends a box containing explosives to the home of his wife, but addressed to himself, with

MURDER Continued

TO

NEGLIGENCE

the expectation that she will receive and open the same and that her death will result, is guilty of assault with intent to commit murder, and the contention that it cannot be presumed that he contemplates that she will, without authority, open the box, the same being addressed to himself and hence no basis on which to predicate a criminal intent, is without merit.—*Idem*.

Same.—On a prosecution for assault with intent to commit murder, the inquiry is "was the defendant inspired by a criminal purpose and intent to make an assault, and did he adopt and put into execution a plan designed to effectuate his purpose and intent," and it is immaterial that in the execution of his plan acts were done unauthorized by the general laws relating to business affairs.—*Idem*.

NEGLIGENCE—See INSTRUCTIONS.

Assumption of Risk—Knowledge of Danger.—Mere knowledge of a dangerous custom is not sufficient to throw the risk thereof upon the person having such knowledge, unless he has also appreciated the danger involved.—*Carver v. Ry. Co.*, 346.

Assumption of Risk—Contributory Negligence.—The distinction between assumption of risk and contributory negligence discussed.—*Idem*.

Assumption of Risk—Age and Experience—Instruction.—On an issue of the assumption of risk, age and experience of the servant should be considered in determining whether he knew or ought to have known and appreciated the danger, and failure to instruct upon this branch of the case was error.—*Shebeck v. Cracker Co.*, 414.

Assumption of Risk—Burden of Proof—Instruction.—In an action for injuries resulting in the death of a servant, owing to alleged defective machinery and negligence of the master to keep it in repair, where the answer alleges that the defective condition of the machinery was known to deceased and that he remained in defendant's employ without objection, the issue of assumption of risk is tendered with the burden upon the defendant, and a general instruction that under the issues the burden is on the plaintiff, is erroneous.—*Idem*.

Assumption of Risk.—An ordinary laborer on an electric railway, who never had occasion to make a car coupling or reason to suppose that he would be required to do so, does not assume the risk of defects in a car or drawhead of which he had no knowledge, when directed by his superior to make a coupling.—*Branz v. Railway & Bridge Co.*, 406.

Contributory Negligence.—In an action for injuries received while coupling cars, where there is a conflict in the evidence as to whether plaintiff made the coupling in the usual and safe method, an issue of fact arises for the jury to determine.—*Idem*.

Assumption of Risk.—Where an employer, or those representing him, furnishes a reasonably safe place to work, reasonably

NEGLECT Continued

safe tools, and reasonably competent fellow laborers, then the employe assumes the risk of the employment. Under this rule a railway company is not liable for injuries to an employe caused by the caving of a bank beside which the employe is at work, where the same was due to the nature of the soil, which is apparent.—*McQueeney v. Ry. Co.*, 522.

Liability of Employer.—Liability of an employer for the negligent act of a foreman does not depend on the difference in rank but on the nature of the employment; if engaged in something which might have been done by another employe, rank is immaterial, and the general rule as to co-employes is applicable.—*Idem*.

Contributory Negligence.—The fact that plaintiff examined the bridge and assisted in making some repairs before crossing, or that he rode the engine while crossing, did not, as a matter of law, render him guilty of contributory negligence, where the real defect was not apparent.—*Perry v. Clarke County*, 96.

Defective Bridge—Want of Notice—Negligence.—When a bridge maintained by a county becomes weakened and dangerous from natural decay, which the exercise of reasonable care would have revealed, the county cannot rely upon want of notice to relieve it from liability for an injury.—*Idem*.

Contributory Negligence—Reasonable Care.—Where there is evidence of obstruction of a railway crossing which raises a doubt whether plaintiff could or could not in the exercise of reasonable care have avoided the accident, the question of contributory negligence should be submitted to the jury.—*Selensky v. Ry. Co.*, 113.

Contributory Negligence.—The fact that the party injured by a defective sidewalk knew that the walk was out of repair, does not as a matter of law render him guilty of contributory negligence.—*Sachra v. Town of Manilla*, 562.

Contributory Negligence.—One who is struck by a moving street car while crossing the track, in full possession of his senses, with an unobstructed view of the track and in no way distracted or interfered with, so that by looking and listening he might have avoided the danger, is conclusively presumed to be guilty of contributory negligence.—*Ames et al. v. Transit Co.*, 640.

Instinct of Self Preservation.—A presumption of the exercise of the instinct of self-preservation does not constitute affirmative evidence of the existence of facts prior to, and remote from the time of the accident.—*Idem*.

Instinct of Self Preservation.—The presumption that deceased, prompted by the instinct of self-preservation, was exercising due care for his own safety at the time of the accident does not obtain, where there is direct evidence of the circumstances surrounding the injury.—*Idem*.

Reasonable Care—Obstructed View.—Where a view of the track is obstructed by an object in such close proximity thereto that

NEGLIGENCE Continued

TO

NOTES AND BILLS

an unobstructed view for any considerable distance between the time of passing the obstruction and coming upon the track is impossible, it is the duty of one attempting to cross under such circumstances to stop, if necessary, and employ his natural faculties in an effort to avoid the danger.—*Idem*.

Reasonable Care—When To Be Exercised—Presumption.—It was necessary for deceased to exercise care at the time of crossing the track, and where the evidence shows a want of such care, it is not overcome by a presumption of its exercise at some other time.—*Idem*.

Reasonable Care.—In crossing a street car track, one is bound to know that cars are likely to pass and to take reasonable care to avoid the injury.—*Idem*.

Cattle Guards—Failure to Keep in Repair.—Permitting a cattle guard to become filled with snow and ice so as to furnish no obstruction to the passage of stock is a failure "to maintain proper and sufficient cattle guards," within the meaning of sections 2022 and 2055 of the Code.—*Paul v. Ry. Co.*, 224.

Negligence of Mail Clerks.—Where a railway company is charged with knowledge of the negligent practice of mail clerks in throwing the mail pouch from a moving car to the station platform, it is liable to one rightfully on the platform, for injuries received thereby.—*Carver v. Ry. Co.*, 346.

Wrongful Act of Mail Clerk—Knowledge of Company.—A railway company is not liable in the first instance for injuries resulting from the negligent act of a mail clerk in throwing the mail pouch from a moving car to the station platform, but may become so liable by permitting the agent to pursue the dangerous practice for a sufficient time to charge it with knowledge of the custom.—*Idem*.

An instruction that defendant, as a matter of law, was required to keep the entry to its mine of uniform height and width, was properly refused, as any question of negligence in failing to furnish plaintiff a safe place to work was for the jury.—*Hamilton v. Coal & Mining Co.*, 147.

NEW TRIAL.

Newly Discovered Evidence.—Where it is claimed that the assured set the fire and he testifies that he was not present at the time it occurred, a motion for a new trial on the ground of newly discovered evidence to the effect that the assured was at the time in the vicinity of the fire should, in view of the entire record in the case, have been granted.—*Germdiner v. Ins. Ass'n et al.*, 614.

While the granting of a motion for a new trial is largely discretionary with the trial court, yet where a case has been properly determined on its merits, a new trial should not be allowed, and will be reversed on appeal.—*Stover v. Flower*, 514.

NOTES AND BILLS—See BILLS AND NOTES.

NOTICE

TO

PARTIES

NOTICE.

Easement.—A decree partitioning the interests of co-tenants and establishing in one a right of way over the land of the other constitutes constructive notice of such easement to a purchaser, though the deeds of the co-tenant and his grantees make no reference thereto.—*Dickinson v. Crowell et al.*, 254.

Execution Sale—Prior Conveyance.—Where a tenant is in possession of real property under a lease from an administrator, the mere statement to the tenant by the husband of the grantee of one of the heirs that such grantee has purchased the interest of such heir, is insufficient to constitute notice of the grantee's rights in the property to one who purchases the interest of the heir at a judicial sale.—*McCormick v. McCormick Harvesting Mach. Co.*, 593.

Infectious Disease—Notice By Physician.—Where no written notice is given by the physician of the existence of an infectious disease, as required by Code, section 2568, the local board of health is without authority to enforce a quarantine.—*State v. Kirby*, 26.

Highways—Notice of Injury.—In an action for injuries from a defective bridge, it is only necessary for the plaintiff to file with the county auditor a notice in substantial compliance with Code, section 3447, giving the time, place and circumstances of the injury in reasonably specific terms, to entitle him to bring his action after the expiration of ninety days from the date of the injury.—*Perry v. Clarke County*, 95.

Where an ordinance for the construction of sidewalks requires that notice shall be served on the lot owner by delivering to him a copy of the resolutions ordering construction, failure to give such notice will relieve the owner of the necessity of constructing his walk at grade.—*Burget v. Town of Greenfield*, 432.

NUISANCE.

Abatement.—The fact that a nuisance may also affect others in the vicinity injuriously will not affect the plaintiff's right to maintain a suit to abate the same, under Code, section 4302.—*Percival v. Yousling*, 451.

OPTIONS—See VENDOR AND VENDEE.

Option Defined.—An option for the purchase of real estate is merely a right of election to purchase, which, when exercised, becomes a contract.—*Hopwood v. McCansland*, 213.

ORDINANCES—See MUNICIPAL CORPORATIONS.**PARTIES.**

Substitution.—Where a party to an action makes an assignment, it is not necessary to substitute the assignee, nor has the other party a right to insist on such substitution.—*Kringle v. Rhomberg et al.*, 472.

PARTIES Continued

TO

PLEADINGS

Funds in Bank.—In order to reach funds in the possession of a bank as a depository, the bank should be made a party to the suit.—*Nourse v. Weltz et al.*, 708.

PARTNERSHIP.

Sharing of Profits and Losses.—The following principles in relation to partnership are established by the decisions of this state: (1) An agreement only to share profits will not constitute a partnership, though evidence of the existence of such relation; (2) The sharing of losses is essential to a partnership, though the undertaking to do so may be inferred from an agreement to divide profits, unless precluded by the terms thereof; (3) That payment for services or for the use of money or property to be used in the business may consist of a share of profits without making the loaner or employe a partner.—*Johnson Bros. v. Carter & Co.*, 355

Evidence of—Sufficiency.—Where one supplies the money to conduct an enterprise for a fixed rate of interest and a share in the net profits, acquiesces in the use of a firm name, furnishes a bookkeeper to handle the funds to offset the labor of the other in overseeing the work, takes the other's note for one-half the cost of material on hand at the close of the business, and states to a third party that the bookkeeper in using the firm name has full authority to represent him, it may be inferred that a partnership relation exists, and is sufficient to authorize submission to a jury of the question of his liability on a note in the firm name signed by the other.—*Idem.*

Statements of Employee—Estoppel.—Where plaintiff extended credit to a supposed firm, relying upon representations of an employe that one of defendants was a member of such firm, if there were in fact no partnership the employe was not authorized to act for such defendant and he was not estopped to deny the partnership.—*Idem.*

Firm Note—Release of Retiring Member.—In an action against a former member of a partnership on a note given by the firm, where the defendant pleaded and testified that in adjusting partnership affairs after the dissolution of the old firm, in consideration of defendant's stepping out of the business and turning it over to the new firm, the plaintiff agreed to look to the new firm for payment of the note, it was error to instruct that in order to find for the defendant it must appear that the agreement to release was made at or before the dissolution, as there was no such issue.—*Hamilton v. Smith*, 93.

PAIN AND SUFFERING—See **DAMAGES.**

PLEADINGS.

Amendment to Petition—Limitation.—In an action for an injury caused by a defective sidewalk, an amendment to the petition alleging merely that the accident occurred at a different place from that originally pleaded, is not the introduction of a new

PLEADINGS Continued

TO

PRACTICE

cause of action; and though filed more than ninety days after the alleged injury it relates back to the date of the original petition and the cause of action is not therefore barred.—*Sachra v. Town of Manilla*, 562.

Sufficiency of.—A pleading which contains allegations of fact sufficient to entitle the pleader to the relief asked is not bad, because it also states conclusions of law.—*Streeter v. Gleason et al.*, 703.

Limitation of Action—Diligence.—In a second action for injuries caused by a defective sidewalk, brought after a voluntary dismissal of the first, which is barred unless within the exception provided in Code, section 3455, the plaintiff must state facts showing that the dismissal of the first action was not the result of negligence on his part. Allegations of the petition considered and held insufficient to show diligence.—*Cepriey v. Town of Paton*, 559.

Breach of Warranty—Failure of Consideration—Election.—In an action on a note given for the purchase price of sheep, defendant may plead both a breach of warranty and failure of consideration, and cannot be required to elect upon which he will rely.—*Commission Co. v. Elwood*, 632.

Loss of Time.—In an action for an illegal arrest, an allegation that plaintiff was deprived of his liberty implies loss of time.—*Young v. Gormley et al.*, 372.

PRACTICE.

Assignment of Error.—An assignment of error not argued will not be considered on appeal.—*Halley v. Tichenor*, 164.

An omnibus assignment of several errors will not be reviewed.—*Idem.*

Statement of Court.—An objection to a remark of the court to which no exception was taken will not be reviewed on appeal.—*Idem.*

Assignment of Error.—A single assignment of error in sustaining a motion for a new trial or in arrest of judgment, as to each and every ground thereof, is not sufficiently specific as required by Code, section 4136.—*Rivers & Co. v. Lamm Bros.*, 283.

Abstract—Motion to Strike.—Where a transcript of the certificate of the trial judge showing that proper steps were taken to preserve the evidence is furnished, it will be presumed that this was done, and a motion to strike the evidence for failure to set out the certificate will be denied.—*Burget v. Town of Greenfield*, 432.

Assignment of Error.—An assignment of error that "the court erred in giving the instructions", naming them, "and each of them," is too indefinite for consideration.—*Powers v. Benson et al.*, 428.

PRACTICE Continued

Assignment of Error—Insufficiency of.—An assignment of error that the court erred in refusing to read, and in reading instructions asked and refused, is not sufficiently specific to be considered.—*Borden v. Isherwood*, 677.

Dismissal of Appeal.—In an equitable action a motion to dismiss an appeal because error is not assigned will be overruled.—*Luke v. Koenen*, 103.

Relevancy of Argument.—An argument on appeal, not addressed to the questions raised on the trial, will not be considered.—*Commission Co. v. Elwood*, 632.

Evidence—Review on Appeal.—Where a party fails to take an exception to a ruling or remark of the trial court regarding the admissibility of evidence, or to raise the question on a motion for a new trial, he cannot insist upon the error in the appellate court based on an objection made by the opposite party.—*Idem*.

Review of Error.—An error in an instruction on the subject of damages which might have been corrected by the trial court if attention had been called to the same, cannot be reviewed when objection is first made on appeal, under Code, section 4105.—*Riley v. Bell*, 618.

Same.—Where complaint is made for the first time on appeal that the court failed to submit an issue raised by the pleadings, the error will not be reviewed.—*Idem*.

Submission of Cause—Amendment to Abstract.—An appeal will be disposed of on the record as presented on the first submission, and an amendment to the abstract filed after a rehearing has been granted will be stricken out on motion.—*Coe College v. City of Cedar Rapids*, 541.

New Issue on Appeal.—Where the issue on the trial was the right to maintain a ditch for drainage purposes, a new issue involving the right to maintain an embankment which in high water kept it from flowing in another direction, cannot be considered on appeal.—*Battles v. Roberts*, 747.

Objection to the Record—Motion to Strike.—Objections to the record or the manner in which it has been preserved must be specifically pointed out or the objection is waived, and a motion to strike will not lie.—*Shebeck v. Cracker Co.*, 414.

Allegations of Fraud.—In an action to recover for property sold on execution as claimed in the wrong county, allegations of fraud in procuring the judgment should, on motion, be stricken out.—*King v. Nelson*, 606.

Allowance for Widow—Application to Set Aside.—Where one of the executors of a will learned of an order making an allowance for the widow shortly after it was made, he cannot have the order set aside on his application filed two years afterwards, because of delay.—*Busby v. Busby et al.*, 536.

PRACTICE Continued

Approval of Record.—The fact that the record of a case is not approved until the succeeding term is not prejudicial error.—*Percival v. Yousling*, 451.

Reopening Case.—A ruling reopening a case for further testimony will not be disturbed in the absence of a showing of abuse of the court's discretionary power.—*Idem*.

Application for Permit—Power of Court to Fix Hearing.—Code, section 2389, providing that applications for permits to sell liquor are to be taken up and disposed of on convening of court, where no cause to the contrary appears, is not mandatory, nor does the provision that "the court shall fix a day in the term for the trial, and all applications shall be tried at the first term * * * if the business of the court shall allow" in case a remonstrance is filed or other cause appears, abridge the general power of the court to determine the business for the term.—*Cox v. Burnham*, 43.

Dismissal of Application—Hearing on.—If, in the exercise of the court's discretion the time for hearing an application for a permit to sell liquor is not fixed for the term at which it is filed, nor before the judge in vacation, an adjournment of the term will not *ipso facto* operate as a dismissal of the application or deprive the court of jurisdiction.—*Idem*.

Continuance—Cause Presumed.—It will be presumed in the absence of a showing to the contrary, that there was cause for continuing the hearing over the term on an application for permit to sell liquor.—*Idem*.

Continuance.—The action of the trial court in overruling a motion for a continuance based on want of notice that the cause had been assigned for trial, where there is a dispute regarding such notice, will not be disturbed.—*Insell v. Kennedy*, 234.

Same.—Under Code, section 4560, where an appeal from a judgment of a justice is not taken on the day it is rendered, the cause will stand for a continuance at the next term of the district court by operation of law, in the absence of notice or waiver of the same.—*Idem*.

Credibility of Witness.—Where the plaintiff attaches interrogatories to his petition which defendant answers, and the same are read in evidence by him, he thereby vouches for the credibility of such witness.—*Darr v. Darrow*, 29.

Discharge of Judgment.—Any one interested in the enforcement of a judgment, having matters of discharge which have arisen since the decree, may, upon motion, under the statute and in a summary way have the same discharged.—*Dunton v. McCook et al.*, 444.

Same.—Where a decree is affirmed, which determines that defendant holds title as trustee which may be divested on payment of a fixed sum, it is proper for the *cestui que trust* to show that since the rendition of the decree defendant has been

PRACTICE Continued

wholly or partially paid from rents and profits arising from the land; and this may be done on a supplemental petition.—*Idem.*

Enforcement of Rules of Health.—The power conferred by statute upon state and local boards of health, to adopt rules and regulations for the preservation of the health of the local community, must be exercised by the authorities as provided in the statute.—*State v. Kirby*, 26.

Infectious Disease—Notice by Physician.—Where no written notice is given by the physician of the existence of an infectious disease, as required by Code, section 2568, the local board of health is without authority to enforce a quarantine.—*Idem.*

Waiver of Notice.—A person by consenting to a quarantine may waive the notice of an infectious disease required by statute, but where the notice of quarantine is not given there can be no prosecution for disobeying the order establishing the quarantine.—*Idem.*

Misjoinder.—Misjoinder of causes of action not taken advantage of by motion to strike, is waived.—*Campbell v. Spears*, 670.

Insufficiency of Allegation—Waiver.—In an action on an assessment policy of insurance, the insufficiency of a general allegation that defendant has waived the suspension of a member, though a legal conclusion, is waived by failure to properly object thereto.—*Barrett v. Ins. Co.*, 184.

Issues Subsequent to Decree—Determination of.—Where the defendant raises issues in his answer to a supplemental petition to discharge a judgment, he cannot complain that the court was without jurisdiction to try and determine all the issues raised subsequent to the entry of the original decree.—*Dunton v. McCook et al.*, 444.

Adverse Possession.—Any claim of defendant to the property by adverse possession, or to rents therefrom which the decree adjudged him to hold as trustee subject to payment of the amount due him, cannot antedate the entry of such decree.—*Idem.*

Pleadings—Objection to.—The rule that when the construction of a pleading is doubtful, after giving the language a reasonable intendment, it should be resolved against the pleader, is not to be applied except upon a motion or demurrer attacking the pleading. After issue is joined the pleadings will be liberally construed.—*Lampman v. Bruning*, 167.

Same.—In an action for seduction, where the defendant does not, before the trial, object to an allegation of the petition that plaintiff was of chaste character "on or about" the day she was seduced, as insufficient to raise the question of previous chastity and authorize a recovery for loss of character, he cannot complain thereof on appeal.—*Idem.*

PRACTICE Continued

TO

RAILROADS

Reopening Case.—Refusal to reopen a case after decree to permit further testimony will not be interfered with where there is no abuse of discretion. Showing in this case held insufficient to sustain the motion.—*In re Cumming's Estate*, 421.

Verdict—When Conclusive.—Where the evidence is in conflict the verdict of the jury is conclusive.—*Lutz v. Ins. Co.*, 136.

Verdict Held Not Excessive.—Deceased died as the result of injuries received from a loose plank in a sidewalk about seven months after the injury, during which time she suffered great pain and at times had convulsions. Held, that a verdict for \$3500 was not excessive.—*Bell v. Town of Clarion*, 332.

Withdrawal of Evidence.—The discretion of a trial court in permitting the withdrawal of evidence will not be interfered with in the absence of a showing of abuse.—*Idem*.

Withdrawal of Evidence—Prejudice—New Trial.—Upon the trial plaintiff offered in evidence a transcript of the testimony of certain witnesses on a former trial, which was withdrawn, and the same witnesses were examined on the same subject in open court. Held, it appearing that defendant was not prejudiced thereby it was not error to refuse to discharge the jury and grant a new trial.—*Idem*.

Withdrawal of Evidence.—Where an issue is withdrawn from the jury it is not necessary to also withdraw the evidence on the subject.—*Kirsher v. Kirsher*, 337.

Where evidence is admissible for a certain purpose, the fact that the court in the absence of a request does not limit its application by an instruction, is not prejudicial error.—*Kircher v. Town of Larchwood*, 578.

PLATS—See MUNICIPAL CORPORATIONS—DEDICATION.

PRINCIPAL AND AGENT—See AGENCY.

PRINCIPAL AND SURETY—See SURETIES.

Fraud in Securing Signature of Surety—Defense.—Where a surety signs the note of the principal on the representation that its proceeds are to be applied to the purchase of specific property, when he intends and in fact uses the same in payment of an antecedent debt, the surety may defend a suit on the note on the ground of fraud, and it is error to strike from the answer allegations of fraud.—*Haworth v. Crosby, et al.*, 612.

RAILROADS—See EVIDENCE—NEGLIGENCE—INSTRUCTIONS.

Cattle Guards—Failure to Keep in Repair.—Permitting a cattle guard to become filled with snow and ice so as to furnish no obstruction to the passage of stock is a failure "to maintain proper and sufficient cattle guards," within the meaning of sections 2022 and 2055 of the Code.—*Paul v. Ry. Co.*, 224.

Defective Cattle Guards—Proximate Cause.—Where a cattle guard was so filled with snow and ice as to furnish no ob-

RAILROADS Continued

struction to stock and there was an inducement for plaintiff's colts to follow other horses which had passed over the defective guard, the question whether the failure of defendant to keep the guard in proper condition was the proximate cause of the accident, was for the jury—*Idem*.

Condemnation—Taxation of Attorneys' Fees—Apportionment of Costs.—In a condemnation proceeding, where a trial on appeal to the district court results in the reduction of the damages assessed, the court has no authority to tax against the railway company an attorney's fee for plaintiff's attorney or to apportion the costs, under Code, section 2007.—*Wormely v. Ry. Co.*, 684.

Injury to Employee—Assumption of Risk.—Where an employer, or those representing him, furnishes a reasonably safe place to work, reasonably safe tools, and reasonably competent fellow laborers, then the employee assumes the risk of the employment. Under this rule a railway company is not liable for injuries to an employee caused by the caving of a bank beside which the employee is at work, where the same was due to the nature of the soil, which is apparent.—*McQueeny v. Ry. Co.*, 522.

Injury to Stock—Defective Cattle Guards—Proximate Cause.—On an issue as to whether plaintiff's colts were killed inside defendant's right of way, where they had gone owing to defective cattle guards, or on the crossing protected by the cattle guards, the evidence is considered and held sufficient to warrant the jury in finding that one of the colts was killed on or within the guards. Notwithstanding the statement of the engineer that it was killed within the crossing.—*Paul v. Ry. Co.*, 224.

Negligence—Death of Fireman.—In an action for the death of a fireman who left his cab and was at work about the engine in the switch yards of defendant when he was struck by another switch engine and killed, the evidence is considered and held that no negligence on the part of the defendant was shown.—*Brown v. Railway Co.*, 280.

Negligence of Mail Clerks—Liability of Railway Company.—Where a railway company is charged with knowledge of the negligent practice of mail clerks in throwing the mail pouch from a moving car to the station platform. It is liable to one rightfully on the platform, for injuries received thereby.—*Carver v. Ry. Co.*, 346.

Right of Way—Presumption as to Width—Evidence.—In the absence of proof to the contrary a railway company will be presumed to have appropriated a right of way of the maximum statutory width, but this presumption simply casts the burden on one asserting the contrary and may be overcome by evidence rebutting the inference.—*Canning Co. v. Ry. Co.*, 724.

Right of Way—Possession.—A decree in a condemnation proceeding granting a railway company an easement for right of way purposes over the land of another has the same force as a

RAILROADS Continued

TO

RECEIVERS

deed so far as the right to possession and control is concerned, and any subsequent possession by the land owner, in the absence of a showing that his holding is adverse, is subservient to the rights of the railway company.—*Railway Co. v. Snyder*, 532.

RATIFICATION—See AGENCY.

REAL PROPERTY.

Adverse Possession.—Payment of rent for a series of years by the occupant of land will preclude his heir from acquiring title by adverse possession.—*Slatterly v. Slatterly et al.*, 717.

Land Contract—Revocation.—A contract for the purchase of real property entered into between plaintiff, the owner of the property and also the holder of a certificate of sale thereto, whereby plaintiff is to acquire full title from the other parties, is revoked by the transfer of the certificate of sale to another who acquires a deed thereunder, the consideration for which is claimed by the owner, and may be cancelled at the suit of the plaintiff.—*Newcomb v. Plow Co., et al.*, 570.

Sufficiency of Description—Estoppel.—A description of real property that will pass title by a deed is sufficient in a judicial sale, and where one seeking to enjoin an execution sale alleges ownership of the property described in the execution he is estopped to deny the sufficiency of description.—*McCormick v. McCormick Harvesting Mch. Co.*, 593.

Subsequent Possession of Grantor.—Where a father conveys land to his son, it will be presumed that his subsequent possession is in subordination to the title of the son, and not adverse, in the absence of a showing that he asserted a hostile title.—*Luckhart v. Luckhart*, 248.

Taxation—Public Land—Title.—A sale of public land for taxes assessed prior to the issuance of patent conveys no title to the purchaser.—*Campbell v. Spears*, 670.

RECEIVERS.

Accounting Evidence.—In an action for an accounting for lumber sold by a receiver, the evidence showed that the estimate of the material received by him was inaccurate, but the total amount realized from the sales and accounted for by the receiver nearly equaled the value as shown by the receiver's invoice, so that an objection that the receiver had not accounted for the property coming into his hands could not be sustained.—*Ripley v. McGavic et al.*, 52.

Exercise of Powers.—A receiver is required to use the care, skill and prudence in the sale and management of property entrusted to him that a man of ordinary skill and prudence would exercise with his own property under like circumstances. He is not liable for errors in judgment, an insurer of the property, or guarantor of particular results.—*Idem.*

RECEIVERS Continued

TO

SALES

Where a receiver appointed to sell lumber purchases from other dealers to fill his orders, paying cash from the trust fund, and immediately reimburses that fund by a sale of the same, so that no loss is sustained, those interested in the trust cannot complain, though the receiver had no express authority so to do.—*Idem*.

RECORDER—See COUNTY OFFICERS.

RECEIPTS.

Construction of the Word "Receipts."—In an indorsement on a contract for the purchase of machinery it was provided that the purchaser should reserve a certain amount from the "daily receipts" of the business and remit the balance to apply on the purchase price of the machinery. Held, that the word "receipts" meant the gross receipts of the business.—*Mfg. Co. v. Creamery Co.*, 584.

REDEMPTION—See TAXATION.

REFORMATION—See APPEAL BOND.

REPLEVIN.

Default Judgment Against Purchaser.—In a replevin action on the ground that the sale of the goods was induced by the fraud of the purchaser, in which the purchaser's trustee in bankruptcy is substituted party defendant on his own motion, if the original defendant defaults, a judgment should be entered against him for the value of the goods not found.—*Kuh, Nathan & Fisher Co. v. Glucklick et al.*, 504.

Damages for Detention.—In a replevin action where one elects to treat the property as converted at the time it was taken and have a money judgment for its value at that time, he is not entitled to damages for detention.—*Powers v. Benson et al.*, 428.

Right to Possession—Proof.—Where the plaintiff in a replevin action bases his right to possession on ownership, a previously executed mortgage on part of the property is inadmissible to establish right of possession.—*Idem*.

Money Judgment—Waiver.—In a replevin action, an election to take a money judgment for the value of the property is a waiver of its return, and vests title in the party holding the same as of the time it was taken.—*Idem*.

Value of Goods—Instruction.—In a replevin action against a trustee in bankruptcy for goods sold the bankrupt, where no judgment is asked except for possession of the goods, an instruction that the jury find the full value of the goods sold is not prejudicial error.—*Kuh, Nathan & Fisher Co. v. Glucklick et al.*, 504.

SALES.

Commissions—Bad Faith of Principal.—In an action by an agent for commissions for the sale of goods, where it is claimed that

SALES Continued

TO

SCHOOLS.

the principal was to accept and fill all orders from persons having a certain rating, but that he acted in bad faith in refusing to fill certain orders, it must appear, in order to bind the principal, that the credit rating of such rejected customers was one known to and in use by the defendant, and private information obtained by the agent as to the responsibility of such customer is inadmissible for the purpose of establishing bad faith.—*Wolfson v. Allen Bros.*, 455.

Commission Contract—Rejection of Orders.—A contract providing that an agent shall receive a commission for the sale of goods on all orders taken by him which his principal may "accept and ship" is binding to the extent only of the accepted orders, in the absence of a showing of bad faith on the part of the principal in rejecting orders.—*Idem*.

Delay in Furnishing Machinery—Speculative Damages.—Mere delay in furnishing machinery which does not interrupt an established business will not sustain an action for damages for loss of patronage.—*Mfg. Co. v. Creamery Co.*, 584.

Sale of Corn—Title.—A written agreement to sell a certain number of bushels of corn to be taken from a standing field does not pass the title, though a portion of the purchase price is paid.—*Augustine v. McDowell et al.*, 401.

Same.—Where one pays for corn and it is set apart in the crib of the seller with nothing further to be done except for the seller to assist in hauling, the title thereto passes.—*Idem*.

Sale of Machinery—Premature Suit.—Where a contract for the sale of machinery provides that a note for a stated amount and falling due at a specified time shall be given in part payment, and upon failure to give the note the contract shall stand as the obligation of the purchaser, having the same force as the note, a suit on the contract brought prior to the time the note would have matured is premature.—*Reeves & Co. v. Lamm Bros.*, 283.

SCHOOLS.

School Funds—Deposit in Bank.—A school township treasurer may rightfully make a general deposit of the funds of his district in a solvent bank in his name as such treasurer, and the title to the fund will not thereby pass to the bank nor does it amount to a conversion; and any guaranty which the bank may give to secure him against loss in case of its failure is not invalid, either on the ground that the deposit was wrongful, or as against public policy.—*Hunt v. Hopley*, 695.

Formation of Independent District—Construction of Statute.—A portion of a rural independent school district may be included with part of a school township and a new independent district formed under Code, section 2794, although there will remain in the independent district thus severed less than four sections of land, and in so construing said section it may be necessary to extend its provisions to include independent districts.—*Independent Dist. v. Dist. of Kelley*, 119.

SCHOOLS Continued

TO

STATUTES

Appeal—Adjudication.—Where the subject of litigation was appealed to the state superintendent and the same conclusion reached by him which the court arrives at, it is not necessary to determine whether the remedy by appeal is exclusive or constitutes an adjudication binding upon the court.—*Idem*.

Time does not settle the boundaries of an independent district so that they cannot be changed according to law.—*Idem*.

SEDUCTION—See PRACTICE—DAMAGES.

SIDEWALKS—See MUNICIPAL CORPORATIONS.

SPECIFIC PERFORMANCE.

Estoppel.—Defendant gave plaintiff an option or contract to purchase land, agreeing that plaintiff should notify him of his final conclusion in the matter. Within the time agreed plaintiff's agent notified defendant that he could not raise the money and that unless defendant extended the time, which he refused to do, the option would be abandoned. Thereafter defendant made valuable improvements and leased the land for a term of years. Held, that plaintiff's acts and conduct estopped him from enforcing specific performance.—*Hopwood v. McCausland*, 218.

Vendor and Purchaser—Sale of Land—Reservations.—Where the purchaser of real estate is informed by the vendor before a contract of sale is executed that he will make certain reservations, and by mistake or oversight the agent of vendor omits a part of such reservations from the written contract, specific performance will not be decreed at a suit of the purchaser.—*Wilken v. Voss et al.*, 500.

Performance by Purchaser—Payment.—An agent for the sale of land has no implied authority to accept in part payment anything but cash, and where the contract recites part payment in a stated sum, which is not in fact paid in money, there is a failure of the purchaser to perform the contract which will defeat specific performance at his suit.—*Idem*.

STATUTES.

Intoxicating Liquors.—Statutes relating to the sale of liquor are construed by the same rule applicable to the construction of statutes generally, except as modified by Code, section 2431, which provides that the general chapter relating to intoxicating liquors shall be so construed as to prevent evasion.—*Cox v. Burnham*, 43.

Amendment of Statute—Effect.—Action by the legislature in amending a statute to make it conform to a particular case is not an admission that it did not originally cover such a case, which will prevent a judicial interpretation giving it the same effect as the amendment.—*Independent Dist. v. Dist. of Kelley*, 119.

The rule that a statute cannot be extended by construction to cover a *causus omissus* is not recognized in the interpretation of remedial statutes.—*Idem*.

STATUTES OF FRAUD Continued

TO

SURETIES

STATUTE OF FRAUDS.

Written Admission of Contract.—A receipt for rent notes, providing that if the tenant shall pay the landlord \$4,000 "on the purchase price of farm, and deliver a mortgage for the whole amount" the lease and notes shall be returned, is insufficient as a written admission of an oral contract of purchase to take it out of the statute of frauds, and the court cannot look beyond the writing itself to ascertain the terms of the contract.—*Allan v. Bemis*, 172.

STREET RAILWAYS—See TAXATION.

Assumption of Risk.—An ordinary laborer on an electric railway, who never had occasion to make a car coupling or reason to suppose that he would be required to do so, does not assume the risk of defects in a car or drawhead of which he had no knowledge, when directed by his superior to make a coupling.—*Branz v. Railway & Bridge Co.*, 406.

Reasonable Care—Obstructed View.—Where a view of the track is obstructed by an object in such close proximity thereto that an unobstructed view for any considerable distance between the time of passing the obstruction and coming upon the track is impossible, it is the duty of one attempting to cross under such circumstances to stop, if necessary, and employ his natural faculties in an effort to avoid the danger.—*Ames et al. v. Transit Co.*, 640.

Personal Injury—Care.—In an action against a street railway company for an injury resulting in death, it appeared that several covered wagons following each other were passing along a street in close proximity to the car track. Deceased stepped from behind the last of these upon the track and was struck by a car. There was evidence showing that the car was running at an unlawful speed, but there was no evidence of the exercise of care by deceased at the time of the injury, the circumstances surrounding the accident, however, were shown. Held, that a verdict for defendant was properly directed.—*Idem*.

SUBROGATION.

Appeal Bond—Rights of Obligee.—Where the conditions of a bond are broken, the money deposited by a principal to indemnify his sureties may be reached by the obligee through the equity of subrogation.—*Nourse v. Weltz et al.*, 708.

SURETIES.

Building and Loan—Usury.—A husband who joins in the execution of a note and mortgage on the wife's property to secure the payment of a loan made to her by a building and loan association, of which she was a member, becomes a surety for the payment of the debt according to her contract, and cannot avail himself of the defense of usury.—*Building and Loan Ass'n. v. McClain*, 527.

Defective Bond—Liability of Surety.—An incomplete bond, unsigned by the principal, cannot be enforced against a surety

SURETIES Continued

TO

TAXATION

in the absence of proof that the surety consented to its delivery in its incomplete condition.—*Novak v. Pitlick*, 286.

Release of Surety—Evidence.—Where property of the principal debtor has come under the control of a creditor, either by a voluntary act of the debtor or by legal process for the purpose of application to the debt, a voluntary relinquishment of such security will discharge a surety from liability to an extent corresponding with its value. Evidence considered and held to release the surety under the above rule.—*Hendryx v. Evans et al.*, 310.

TAXATION.

Street Railway—Manner of Assessment.—Code, section 1343, when properly construed, provides that a street railway is to be assessed as an organized money-earning whole, with proper allowance for its state of repair, and is not to be resolved into its component parts for separate listing and assessment.—*City of Marion v. Ry. Co.*, 259.

Assessment—Different Districts.—Where a street railway extends into more than one taxing district, each district should assess its portion of the same on the basis of a fair and equitable valuation of the entire system.—*Idem*.

Assessment of Franchise.—The franchise of a street railway company is not assessable, but the fact that the railroad is in successful operation may be taken into consideration in fixing its value.—*Idem*.

Discovery of Taxes.—A county treasurer is not charged with the duty of discovering property for taxation which has been omitted by fraud or otherwise.—*Shinn v. Cunningham et al.*, 383.

Discovery of Omitted Property.—A board of supervisors had authority under Code, section 1874, to contract with a party to discover taxable property, which through fraud or for other cause, had been omitted from taxation.—*Idem*.

Increase of Assessments—Notice—Waiver.—The provision of an ordinance of a special charter city that before the board of equalization can increase an assessment, a notice containing an alphabetical list of the owners of the property and its assessed valuation shall be posted at the door of the collector's office must be strictly complied with before an assessment can be legally increased; and the fact that a taxpayer may know of the proposed increase and appears before the board of equalization for the purpose of explaining his assessment, and to protest against the action of a committee recommending an increase, will not constitute a waiver of the posted notice required by the ordinance.—*City Ry. Co. v. Redmond et al.*, 601.

Homestead—Sale for Taxes.—Under section 876 of the Code of 1873, a homestead not separately listed could be sold for taxes on other property belonging to the same owner.—*Bitzer v. Becke et al.*, 66.

TAXATION Continued

TO

TRUSTS

Redemption from Tax Sale—Extension of Time.—Where a property owner before his right of redemption expires brings a suit in equity to enjoin the execution of a tax deed to his homestead, pursuant to a sale for an amount including the tax on other property, and tenders in redemption the amount he claims due and offers to pay whatever the court may adjudge, he should be granted a reasonable time in which to redeem after the amount due is determined, though the statutory period for redemption has expired.—*Idem*.

Sale of Public Land.—A sale of public land for taxes assessed prior to the issuance of patent conveys no title to the purchaser.—*Campbell v. Spears*, 670.

Right of Redemption—Premature Deed.—Code, section 1441, absolutely fixes the time for redemption of property sold for taxes, to ninety days after completed service of notice, and this time is not extended by the premature issuance of a tax deed.—*Wood v. Coad*, 111.

TAXATION OF COSTS—See **COSTS**.

TRUSTS.

Defalcation of Trustee—Rights of Beneficiary—Lien of Creditors.

—Where a trustee with power of disposal has a joint interest in an estate with a beneficiary under a will, the beneficiary has no lien on the interest of the trustee to reimburse him for defalcations which is paramount to the lien of the creditors of the trustee that attach prior to the time the beneficiary asserts his claim.—*Wales v. Sammis et al.*, 293.

Interest of Trustee—Rights of Creditors.—Where a wife devises one-third of her entire property to her husband and the remaining two-thirds to him in trust for her minor child, with full power to sell and convey the trust estate and reinvest the proceeds, and in the exercise of such power the husband appropriates to his own use or squanders a large part of the estate, he still has a one-third interest in the remaining realty which can be reached by his creditors, his interest attaching to each tract and not in the estate as a whole.—*Idem*.

Trust in Land—Want of Consideration.—Where a father conveys real estate to a son, reciting payment of consideration, those interested in the grantor's estate cannot establish a trust in the land, where there is no proof of fraud or mistake by showing that the deeds were in fact without consideration.—*Luckhart v. Luckhart*, 248.

Conveyance by Trustee—Bona Fide Purchaser.—Where a trustee conveys property in violation of the trust, the grantee will acquire no title unless he is a purchaser for value without notice of the trust.—*Kringle v. Rhomberg et al.*, 472.

Resulting Trust—Parol Evidence to Establish.—Where the title to real property purchased in a partnership transaction is taken

TRUSTS Continued

TO

WAIVER

in the name of one of the partners, there is a resulting trust in favor of the partnership which may be shown by parol, so that the same may be charged with the interest of the partnership.—*Idem*.

USURY—See BUILDING AND LOAN ASSOCIATION.

VENDOR AND VENDEE.

Liability of Vendee.—Where the vendor by his own act, though indirectly, places it beyond his power to pass title according to his contract, the vendee is not liable for the purchase price though in default in the payment of taxes.—*Newcomb v. Plow Co.*, 570.

Options—Enforcement of.—Code, sections 4299-4301, providing contracts for the sale of or agreement to sell any interest in real estate shall not be forfeited unless written notice of intention to forfeit is served on the vendee, do not prevent the making and enforcement of options to purchase land.—*Hopwood v. McCausland*, 218.

Sale of Land—Reservations—Specific Performance.—Where the purchaser of real estate is informed by the vendor before a contract of sale is executed that he will make certain reservations, and by mistake of oversight the agent of vendor omits a part of such reservations from the written contract, specific performance will not be decreed at a suit of the purchaser.—*Wilkin v. Voss et al.*, 500.

VENUE—See CHANGE OF VENUE.

VERDICT—See PRACTICE.

WAIVER—See INSURANCE—EVIDENCE.

Assessment.—The fact that a tax-payer may know of the proposed increase and appears before the board of equalization for the purpose of explaining his assessment, and to protest against the action of a committee recommending an increase, will not constitute a waiver of the posted notice required by the ordinance.—*City Ry. Co. v. Redmond et al.*, 601.

Proof of Loss.—Where plaintiff notifies the insurance company of the loss and it sends an adjuster, who accepts plaintiff's proposition of settlement and promises to report the company's actions thereon, and where on renewed demand for settlement the company promises further inspection but fails to make it or notify plaintiff of its acceptance or rejection of his proposition, or to demand proof of loss before maturity of the claim, the company waives its right to require proof of loss.—*Condon v. Hall Ins. Ass'n*, 80.

Same.—Where the insurance company, before suit, notified plaintiff, whose corn was damaged by hail, to send it an account of the acreage covered by the policy and amount harvested, and

WAIVER Continued

TO

WATERS

the assured replied by giving the amount of the loss, to which defendant said it would give the matter attention but failed to do so and denied all liability, it waived its right to demand a further account of the amount harvested.—*Idem*.

Replevin.—In a replevin action, an election to take a money judgment for the value of the property is a waiver of its return, and vests title in the party holding the same as of the time it was taken.—*Powers v. Benson et al.*, 428.

Insurance—Payment of Loss—Rights of Mortgagee.—The assured cannot waive the effect of an arbitration of a loss under a policy of insurance whereby the company elects to pay the loss rather than replace the property, so as to bind a mortgagee to whom the loss was payable.—*Building and Loan Ass'n v. Ins. Co.*, 530.

Renewal of Note.—The making of renewal notes is presumptive evidence of a waiver of any defense to the indebtedness, but is not conclusive.—*Commission Co. v. Elwood*, 632.

Waiver of Notice.—A person by consenting to a quarantine may waive the notice of an infectious disease required by statute, but where the notice of quarantine is not given there can be no prosecution for disobeying the order establishing the quarantine.—*State v. Kirby*, 26.

WARRANTY.

Breach—Excuses—Evidence.—Where one installs an ice plant in a creamery building under contract of warranty, with a knowledge of the size and character of the building, to be accepted by the purchaser upon completion and trial if satisfactory to him, a breach of the warranty is not excused by reason of any claimed defect in the construction of the building.—*Mfg. Co. v. Creamery Co.*, 584.

Failure of Warranty—Acceptance—Evidence.—Evidence in an action to recover the price of an ice plant installed in a creamery building under a contract of warranty providing for a trial, and if found to comply with the warranty the purchaser should accept it, is considered and held to show failure of the warranty and that the plant was never accepted.—*Idem*.

Breach of Warranty—Pleading.—A counterclaim for breach of warranty in sale of sheep is not objectionable because of items for care, feed and expense of keeping. The question of whether the breach of the warranty is the proximate cause of the damage being one of proof and not of pleading.—*Commission Co. v. Elwood*, 632.

WATERS.

Unlawful Diversion.—The fact that water was standing on plaintiff's land at the time of the wrongful diversion of other water by defendant onto his land would not necessarily defeat plaintiff's recovery.—*Warner v. Railway Co.*, 159.

WILLS

WILLS—See ESTATES OF DECEDENTS.

A testator bequeathed to his wife and daughter the use of his farm so long as they desired to manage it, but if sold the proceeds to be divided equally between the wife and two children "the part so given to the wife to be in lieu of her dower." The wife died without a disposition of the farm. Held, the provision, "in lieu of dower", related to a disposition of the proceeds of the sale of the farm; that the provisions of the will were not inconsistent with her right to dower in the land, and that she became the owner of a one-third interest in the land which upon her death was subject to her debts.—*Kiefer v. Gillett et al*, 107.

Agreement to Accept Less Than Bequest—Validity Of.—An agreement of a legatee made during minority that the amount of a note due from her to the estate shall be deducted from her bequest is void, because of her minority and also for want of consideration.—*In re Cumming's Estate*, 421.

Construction—Advancements—Indebtedness of Heir.—Where a testator bequeaths to his children an equal share but directs that from the share of one a certain sum shall be deducted for advancements, the same includes all indebtedness due the estate from such heir at the time of the execution of the will.—*Idem*.

Construction of Will—Life Estate—Provision for Children.—The testator devised all his property to his wife for life with "full use, management, control and disposal for her use, comfort and support so long as she shall live," and at her death the remainder to their children. Held, that the widow took a life estate and that the disposition of the remainder did not constitute a substantial support for the child.—*Rowe v. Rowe*, 17.

Construction of—Stocks and Bonds—Legacy.—Testator died owning stock in a corporation, which he bequeathed to certain heirs. Prior to his death he made an arrangement with the corporation by which the same was to be converted into bonds. Pending the issuance of the bonds, however, a corporation note was to be given in exchange for the stock. The stock was issued but not delivered during the life of the testator, and his executors exchanged the stock for the note. Held, the legatees were entitled to the stock or the proceeds derived therefrom, under the provisions of the will.—*Frahm et al. v. Steffen et al.*, 85.

Election—Sale of Homestead.—Where the husband, who is made the sole legatee and executor of the will of his deceased wife, completes a sale of her homestead pursuant to a contract made by the wife and the order of court, the same does not constitute an election to take under the will so as to preclude him

VOL. 120 IOWA.—52.

WILLS Continued

from electing to take the proceeds of the sale and use the same in the purchase of a new homestead.—*Milner v. Davis*, 231.

Homestead—Diversion of Proceeds.—The fact that a purchaser of the homestead belonging to the wife under a contract of sale made by her, deposits a portion of the purchase price in a bank to the credit of the husband, who is sole legatee under her will, through an arrangement with the husband to complete the sale, does not constitute a diversion of the fund prior to settlement of the estate so as to deprive it of its homestead character.—*Idem*.

Executor's Report—Objection to—Estoppel.—The fact that a legatee under a will who is a nonresident of the state employs attorneys to represent her, who advise the executor to make a certain charge against her, will not estop such legatee from resisting such charge on learning the facts and before final settlement of the estate, where it appears that such attorneys without her knowledge were also attorneys for the executor.—*In re Cumming's Estate*, 421.

Revocation.—Prior to the adoption of the Code of 1891, the birth or adoption of a child after the making of a will and prior to the death of the testator operated to revoke the will.—*Rowe v. Rowe*, 17.

Testamentary Capacity—Presumption.—The law does not presume, from the mere fact that immediately following a stroke of apoplexy, testator was mentally incompetent, that this condition continued and existed at the time of making his will some two years later.—*Kirsher v. Kirsher*, 337.

Authorities Cited

IN THE OPINIONS REPORTED IN THIS VOLUME.

A

Am. & Eng. Enc. Law, (1st Ed.), 145 et seq.....	332
4 Am. & Eng. Enc. Law, 302	203
5 Am. & Eng. Enc. Law, (1st Ed.), 425.....	723
8 Am. Eng. Law, 287	243
14 Am. & Eng. Enc. Law, 1085,	5
14 Am. Eng. Enc. Law, (2nd Ed.) 21.....	210
14 Am. & Eng. Enc. Law, (2nd Ed.) 120.....	625
14 Am. & Eng. Enc. Law, (2nd Ed.) 190.....	209
17 Am. & Eng. Enc. Law, 939.....	546
18 Am. & Eng. Enc. Law, (2nd Ed.) 375.....	669
20 Am. & Eng. Enc. Law, 1219.....	496
20 Am. & Eng. Enc. Law, (2nd Ed.) 122.....	419
21 Am. & Eng. Enc. Law, 292.....	691
23 Am. & Eng. Enc. Law, (2nd Ed.) 374.....	701

B

9 Bacon's Abridgment, pp 238-256	265
Bacon's Mutual Benefit Ass'n, Sec. 385.....	691
1 Bacon's Benefit Societies, Secs. 91, 92, 185.....	694
1 Beach, Contracts, Sec. 1734.....	188
2 Beach, Contract Law, Sec. 1214.....	529
Beach, Contributory Negligence, (2nd Ed.) Secs. 61-64.....	665
Beach, Receivers, Secs. 318, 320	332
Bishop Statutory Crimes, Secs. 128, 146.....	125
2 Bishop, Criminal Law, Sec. 665	242
Brandt, Suretyship, (2nd Ed.) Vol. 2, Sec. 1419.....	714
Buswell, Insanity, 213.....	342

C

Cooley, Torts, 458.....	431
Cooley, Torts, 498.....	625
Cooley, Torts, (2nd Ed.) 810.....	665
1 Cycl. 1039	534
3 Cycl. 422	447
5 Cycl. 341.....	510
6 Cycl. 342.....	677

D

Dillon, Municipal Corporations, Sec. 283.....	496
---	-----

E

Elliott, Roads & Streets, (2nd Ed.) Sec. 117.....	80
4 Ency. Pl. & Prac., 741.....	170

G

- 3 Greenleaf, Evidence, Sec. 13..... 243
 Greenleaf, Evidence, (14th Ed.) Sec. 147..... 74

L

- Lawson, Presumptive Evidence, 179 342
 Lawson, Usage & Custom, pp. 284, 285..... 639
 2 Lewis, Eminent Domain, Sec. 656..... 412
 1 Lindley, Partnership, (Ewell), 30..... 360

M

- 1 May, Insurance, (4th Ed.), Sec. 43..... 302
 1 May, Insurance, (4th Ed.), Sec. 66..... 302
 Mechem, Agency, Secs. 83-86..... 182
 Mechem, Agency, Secs. 281, 485, 989..... 639
 Mechem, Agency, Sec. 571..... 624

P

- 2 Phillips, Evidence, 373 678
 Pomeroy, Equity Jurisprudence, (2nd Ed.) Sec. 681..... 299
 Pomeroy, Equity Jurisprudence, Secs. 1035, 1036..... 252
 Pomeroy, Equity Jurisprudence, Sec. 1070..... 58

R

- Rogers, Expert Evidence, (2nd Ed.) p. 128..... 568

S

- Schouler, Wills, (3rd Ed.) Sec. 207..... 342
 Sedgwick, Construction, p. 308..... 125
 Stearns, Suretyship, Sec. 99..... 318
 Stephens, Digest Evidence, 141 678
 Story, Partnership, Sec. 99..... 5
 Sutherland, Damages, 539..... 431

T

- 1 Thompson, Negligence, (2nd Ed.) Sec. 184..... 350
 Thornton, Gifts, Sec. 587..... 75

W

- Warvelle, Vendors, (2nd Ed.) Sec. 125..... 221
 1 Washburn, Real Property, (1862) 218, 250 738
 3 Washburn, Real Property, (5th Ed.) pp. 347, 348..... 257
 Waterman, Specific Performance, Sec. 152... 222
 Watson, Damages for Personal Injuries, Sec. 530..... 171
 Wells, Replevin, Secs. 223, 580..... 431
 Wharton's Negligence, Secs. 212, 282..... 418

Cases Cited.

IN THE OPINIONS REPORTED IN THIS VOLUME.

A

Acker v. Priest	92	Iowa, 610	250
Adams v. Ins. Co.	85	Iowa, 6	280
Alden v. Johnson	63	Iowa, 125	19
Alexander v. Bishop	59	Iowa, 572	322
Allen v. Davenport	115	Iowa, 20	448
Allen v. Elderkin	62	Wis., 627	313
Allen v. Leach	29	Atl. Rep. 1050 (Del.)	391
Allibone v. Ames	9	S. Dak., 74	700
Allison v. Jack	76	Iowa, 205	210
Alston v. State	92	Ala., 124	393
Anderson v. Buck	66	Iowa, 490	672
Anderson v. Daly	16	Utah, 28	525
Andregg v. Brunskill	87	Iowa, 351	366
Angell v. Springfield, Home	157	Mass., 241	91
Angier v. Webber	14	Allen, 221	5
Annaker v. C. R. I & P. Ry.			
Co.	81	Iowa, 267	115
Antrobus v. Sherman	67	Iowa, 230	308
Allgeyer v. State of Louis-			
iana	165	U. S., 578	302
Armington v. Palmer	21	R. I., 109	6
Armstrong v. Ackley	71	Iowa, 76	568, 582
Arnold v. Barkalow	73	Iowa, 183	469
Artz v. C. R. I. & P. Ry. Co.	34	Iowa, 153	117, 665
Asbuch v. C. B. & Q. Ry. Co.	86	Iowa, 101	165
Assn. v. Heidt	107	Iowa, 297	528
Assn. v. Schauss	148	Ill., 304	691
Atchison, T. & S. F. Ry. Co.			
v. Moore	29	Kan., 632	525
Aultman, M. & Co. v. Roe-			
mer	112	Iowa, 652	335
Austrian & Co. v. Springer.	94	Mich., 343	639
Autrey v. Autrey's Adm'r..	37	Ala., 614	74
Avery v. Chapman	62	Iowa, 144	210

B

Bacon v. Kimmel	14	Mich., 201	431
Bailey v. Bensley	87	Ill., 556	639
Bally v. Centerville	108	Iowa, 28	153
Balley v. Market St. Cable			
Co.	110	Cal., 320	643
Bally v. Philadelphia	184	Pa., 594	496
Baker v. C. R. I. & P. Ry. Co.	95	Iowa, 163	647
Baker v. Leathers	3	Ind., 558	72
Baker v. R. R.	95	Iowa, 171	651
Ball v. K. & W. R. R.	71	Iowa, 306	565

Ballou v. Farnum.....	11	Allen, 73	279
Ballou v. Lucas.....	59	Iowa, 22	673
Baltimore & O. R. R. v. Baugh	149	U. S., 368	526
Bangor Sav. Bank v. Ins. Co.	85	Me., 68	279
Bank v. Boddicker	117	Iowa, 407	288
Bank v. Evans.....	15	N. J. Law, 155	291
Barlow v. Ry.....	29	Iowa, 276	729
Barnes v. Town of Marcus.	96	Iowa, 675.....	563
Barney v. McCarthy.....	15	Iowa, 510	256
Barney v. Saunders.....	16	How., 535	391
Barnicle v. Connor.....	110	Iowa, 238	526
Bary v. Farmers' Mutual Ins. Co.....	110	Iowa, 433	85
Bartel v. Hobson.....	107	Iowa, 647	155
Bartlett v. Bangor.....	67	Me., 460	79
Barton's Lessee v. Morris' Heirs	15	Ohio St., 408	597
Baxter v. Myers.....	85	Iowa, 328	327
Beall v. Blake.....	16	Ga., 119	92
Bean v. Parker.....	17	Mass., 594	289
Becker v. Staab.....	114	Iowa, 319	430
Beem v. R. R.....	104	Iowa, 565	658
Beem v. Tama & T. Elec. R. L. Co.....	104	Iowa, 563	643
Bell v. Ellis.....	33	Cal., 624	5
Bell v. Inc. Town of Clarion	113	Iowa, 126	642
Bellison v. Aplan.....	115	Iowa, 599	470
Belows v. Litchfield.....	83	Iowa, 36.....	742
Benedict v. Bird.....	103	Iowa, 612	178
Benjamin v. R. R.....	160	Mass., 3.....	664
Benton Co. Bank v. Bod- dicker	105	Iowa, 548	292
Berghoff v. McDonald.....	87	Ind., 549	624
Bergquist v. Minneapolis...	42	Minn., 471	525
Berry v. Anderson.....	22	Ind., 36	42
Berthold v. Seevers Mfg. Co.	89	Iowa, 506	592
Besiegel v. R. R.....	34	N. Y., 622	663
Bever v. Spangler.....	93	Iowa, 601	341
Bills v. Belknap.....	36	Iowa, 583	439
Binford v. Boardman.....	44	Iowa, 53	70
Birdsall v. Clarke.....	73	N. Y., 73.....	496
Bixby v. Carskadden.....	55	Iowa, 555	209
Blake v. Rourke.....	74	Iowa, 523	341
Blanden v. Ft. Dodge.....	102	Iowa, 441	439, 557
Blazenic v. Iowa & Wis. Coal Co.....	102	Iowa, 708	154
Bliss v. Minneapolis Ry. Co.	34	Minn., 57	230
Blodgett v. Railway.....	63	Iowa, 609	382
Bloom v. Ins. Co.....	94	Iowa, 359	83, 139
Board v. Sweeney.....	1	S. D., 642	291
Boddy v. Henry.....	113	Iowa, 462	624
Boldt v. Budwig.....	19	Neb., 739	379
Bond v. Davis.....	37	Iowa, 163	236
Bondurant v. Crawford.....	22	Iowa, 40.....	625
Boon v. Moss.....	70	N. Y., 473	5

CASES CITED.

828

Borland v. Walrath.....	33	Iowa, 130	34
Bosworth v. Aid Society....	75	Iowa, 582	691
Boulder v. Organ Co.....	92	Ala., 182	715
Bowen v. Hoxie.....	137	Mass., 527	20
Bowers v. Hallock.....	71	Iowa, 218	113
Bowie v. Grand Lodge.....		Cal., 392	695
Bowsher v. Ry.....	113	Iowa, 16	172, 569
Box v. C. R. I. & P. Ry Co.	107	Iowa, 660	563
Brace v. Grady.....	36	Iowa, 352	706
Brackett v. Griswold.....	112	N. Y., 467	210
Bradford v. Boston & M. R. R.	160	Mass., 392	348
Bradley v. Cheesebrough...	111	Iowa, 126	394
Brady v. Brady.....	78	Md., 461	91
Brahm v. Adkins.....	77	Ill., 263	392
Brandon v. Yeakel.....	66	Ark., 377	92
Brann v. Ry.....	53	Iowa, 595	417
Brannen v. R. R.....	115	Ind. Sup., 115	665
Breuck v. City of Holyoke..	167	Mass., 258	444
Briyn v. Bank.....	9	Conn., 413	392
Brown v. Lewis.....	76	Iowa, 159	47
Brown v. R. R.....	32	N. Y., 597	663
Brown v. Smith.....	7	B. Mon., 362	596
Brown v. Taber.....	103	Iowa, 1	544
Brownell v. Chapman.....	84	Iowa, 504	588
Bryan v. Atwater.....	5	Day., 181	740
Buck v. Sherman.....	2	Doug., 176	209
Buckley v. City of New Bradford	155.	Mass., 64	444
Bull v. Gilbert.....	79	Iowa, 547	742
Burchell v. Marsh.....	17	How., 350	278
Burlingham v. Wylee.....	2	Root, 152	378
Burr v. Boyer.....	2	Neb., 265	317
Burton v. Baldwin.....	61	Iowa, 283	130
Bush v. Critchfield.....	4	Ohio, 103	670
Bush v. Fetrow.....		Wils., 387	715
Buzick v. Buzick.....	44	Iowa, 259	738
Byard v. Holmes.....	34	N. J., Law, 296	210
Byington v. Moore.....	62	Iowa, 470	427

C

Callahan v. Phila. Traction Co.	184	Pa., 725	647
Campbell v. Hillman.....	61	Am. Dec., 195	624
Campbell v. Ry.....	110	Ind., 490	727
Candy v. Candy.....	10	Hun., 88	323
Canfield v. Watertown Co..	55	Wis., 419	279
Carey v. Baughn.....	36	Iowa, 540	19
Carnegia v. Hulburt.....	70	Fed. Rep., 209	565
Carpenter v. Boston & A. R. Co.	97	N. Y., 494	348
Carr v. Moore.....	119	Iowa, 152	16
Carragher v. Allen.....	112	Iowa, 168	372
Carrier v. Bernstein.....	104	Iowa, 572	466
Carter v. Moulton.....	51	Kan., 9	292
Cassidy v. Angell.....	12	R. I., 447	657

Cavin v. Gleason.....	105	N. Y., 262	394
Cawley v. LaCrosse City R. Co.	101	Wis., 145	643
Cedar Rapids v. Cowan...	77	Iowa, 535	640
Central Co. v. Ry. Co. (C. C.)	30	Fed. Rep., 335	332
Chaffee v. R. R.....	104	Mass., 115	664
Chamberlain v. McAllister.	36	Ky., 352	670
Chambers v. Watson.....	60	Iowa, 339	92
Chaney v. Coleman.....	77	Texas Sup., 100	676
Chapman v. Allen.....		Morris, 23.....	706
Chesapeake & Ohio Ry. Co. v. Steele's Adm'r.....	29	C. C. A., 81	658
Chicago, R. I. & P. Ry. Co. v. City of Chicago.....	148	Ill., 479	413
Chicago R. R. v. Carey....	115	Ill., 115	658
Chicago R. R. v. Robinson.	127	Ill., 9	661
Christy v. Ogle.....	33	Ill., 295	322
Churton v. Douglas.....	1	Johns Eng. Ch., 174	3
Cincinnati R. R. v. Snell...	54	Ohio St., 197	658
Citizens' Bank v. Fuel Co..	89	Iowa, 618	735
City of Clinton v. Clinton Co.	61	Iowa, 205	270
City of Dubuque v. Maloney	9	Iowa 450	79
City of Indianapolis v. Kings- bury	101	Ind., 200	547
City of Lansing v. Wood..	57	Mich., 201	700
City of Maquoketa v. Willey	35	Iowa, 328	316
City of San Francisco v. Burr	108	Cal., 460	547
Claffin v. Assur. Co.....	110	U. S., 81	625
Clapp v. Greenlee.....	100	Iowa, 586	675, 677
Clapp v. Peck.....	55	Iowa 270	34
Clark v. Barnes.....	72	Iowa, 563	361
Clark v. Fisher.....	54	Kan., 403	322
Clements v. Cassilly.....	4	LaAnn, 380	291
Clement v. Drybread.....	108	Iowa, 701	181
Cleveland C. C. & St. L. P. Co. v. Brown.....	20	C. C. A., 147	525
Cline v. Jones.....	111	Ill., 563	73
Clute v. Knies.....	102	N. J., 377	716
Coates v. Davenport.....	9	Iowa 227	170
Cobb v. Dolphin Mfg. Co....	108	N. Y., 463	279
Coffey v. Gamble.....	117	Iowa, 545	433
Cogswell v. Cameron.....	136	Mass., 518	278
Com. v. McAllister.....	28	Pa., 480	702
Com. v. Piner.....	120	Mass., 185	567
Com. v. Williams.....	56	Mass., 582	37
Commonwealth v. Patch...	97	Mass., 221	27
Commonwealth Bank v. Wister	2	Pet., 318	392
Commonwealth Mut. Fire Ins. Co. v. Knabe & Co...	171	Mass., 265	302
Conger v. Bean.....	58	Iowa, 321	76
Congress Co. v. Knowlton...	103	U. S., 49	520
Conley v. Am. Exp. Co.....	87	Me., 352	351
Connard v. Colgan.....	55	Iowa, 538	250
Consolidated Co. v. Scott...	58	N. Y. Law, 682	662

Consolidated Traction Co. v. Glynn	59	N. J. Law, 432	643
Cook v. Brown.....	34	N. H., 460	42
Cook v. Hamilton.....	67	Iowa, 394	430
Cook v. Logan.....	7	Iowa, 142	403
Coon v. Allen.....	156	Mass., 113	280
Copeland v. Ferris.....	118	Iowa, 554	429
Corbit v. Smith.....	7	Iowa, 65	341
Corbin v. Cedar Rapids Ry. Co.	66	Iowa, 73	413
Corn Exchange Bank v. Applegate	91	Iowa, 411	734
Corning Co. v. Davis.....	44	Iowa, 622	69
Correll v. R. R.....	38	Iowa, 120	664
Corson v. Coal Hill Co....	101	Iowa, 228	154
Corya v. Corya.....	119	Ind., 593	391
Couch v. Watson Co.....	46	Iowa, 17	153
County of Mahaska v. Ingalls	16	Iowa, 81	74
Cox v. Collis.....	109	Iowa, 270	711
Cox v. Newkirk.....	73	Iowa, 42	469
Cox Shoe Co. v. Adams....	105	Iowa, 402	508
Craig v. Conover.....	80	Iowa, 358	232
Crawford v. C. G. W. Co...	109	Iowa, 433	117
Crawford v. Liddle.....	101	Iowa, 148	70
Creamer v. West End St. R. Co.....	156	Mass., 320	643
Crelighton v. Keith.....	50	Neb., 810	315
Cross v. Garrett.....	35	Iowa, 480	165
Crossley v. Stanley	112	Iowa, 24	614
Cruttwell v. Lye.....	17	Ves., 335	3
Culp v. Price.....	107	Iowa, 136	75
Cummings Est.....	153	Pa., 397	91
Cummings v. Long.....	16	Iowa, 41	256
Cummings v. R. R. Co....	114	Iowa, 86	653
Cunningham v. Shannon...	4	Rich, Ed., 140	743
Cushing v. Seymour.....	30	Minn., 305	588
Cushman v. Fuel Co.....	116	Iowa, 618	149
C. I. & D. R. R. v. Estes..	71	Iowa, 603	706

D

Dair v. U. S.....	16	Wall, 1	292
Daley v. Gates.....	65	Vt., 591	565
Dalton v. R. R.....	104	Iowa, 26	654
Daly v. Kimball Co.....	67	Iowa, 132	181
Damon v. Granby.....	2	Pick., 345, 359	497
Danville v. Mirrick.....	25	Wisc., 688	521
Davenport Plow Co. v. Lamp	80	Iowa, 722	391
Davis v. Am. Society.....	75	N. Y., 362	378
Davis v. Bowmar.....	55	Miss., 671	740
Davis v. Close.....	104	Iowa, 261	91
Davis v. Forbes.....	171	Mass., 548	350
Decker v. Decker.....	121	Ill., 341	92
Dee v. Ins. Co.....	104	Iowa, 167	85, 279
Deep Mine & D. Co. v. Fitzgerald	21	Colo., 533	526
Deere v. Bayley.....	80	Iowa, 205	309

Delaney v. Rochereau.....	44	Am. Rep., 456	624
Denison v. Watts.....	97	Iowa, 633	142
Denning v. Butcher.....	91	Iowa, 425	344
Deputron v. Young.....	134	U. S., 241	313
Dermont v. Mayor.....	4	Mich., 455	444
Detroit, etc., R. R. v. Van- Steinburg	17	Mich., 120	667
Diggins v. Hartshorn.....	108	Cal., 154	546
Dirkson v. Knox.....	71	Iowa, 728	209
Disbrow v. Board.....	119	Iowa, 537	385
Dist. Tp. v. Bank.....	88	Iowa, 194	391
Dist. Tp. v. Hardinbrook..	40	Iowa, 130	701
Dist. Tp. v. Morton.....	37	Iowa, 551	700
Dist. Tp. v. Smith.....	39	Iowa, 10	701
Dixson v. Dixon.....	19	Iowa, 512	565
Doniphan v. Street.....	17	Iowa, 317	170
Dowling v. Allen.....	74	Mo., 13	419
Drake v. Ry.....	63	Iowa, 302	727
Driscoll v. Ind. School Dist. of Council Bluffs.....	61	Iowa, 466	496
Duncan v. Newcomer.....	9	S. D., 375	672
Duncan v. U. S.....	7	Pet., 435	291
Dunlavy v. R. R.....	66	Iowa, 435	651
Dunn v. Zwilling Bros.....	94	Iowa, 233	251
Dunton v. McCook.....	93	Iowa, 258	445
Durham v. Angier.....	20	Me., 242	739
Dyer v. Des Moines Ins. Co.	108	Iowa, 524	83
Dysart v. Furrow.....	90	Iowa, 59	746

E

East Omaha Land Co. v. Hansen	117	Iowa, 96	16
Eastern Bldg. & Loan Ass'n v. Williamson	23	Sup Ct. Rep., 527	319
Eastham v. Powell.....	51	Ark., 530	73
Eckford v. Eckford.....	91	Iowa, 55	92
Ecroyd v. Coggeshall.....	21	R. I., 1	496
Edward v. Clark.....	83	Mich., 246	322
Eldredge v. Bell.....	64	Iowa, 125	371
Ellis v. Eden.....	25	Beavan, 482	91
Ellis v. Iowa City.....	29	Iowa, 229	558
Ellsworth v. Low.....	62	Iowa, 178	112
Ellsworth v. Van Ort.....	67	Iowa, 222	113
Emerick v. Emerick.....	83	Iowa, 411	399
Emerson v. Miller.....	115	Iowa, 315	480
England v. Downs.....	6	Beav., 269	4
Ennis v. Shiley.....	47	Iowa, 552	468
Enright v. Ins. Co.....	15	N. Y. Supp., 893	271
Ernst v. R. R.....	35	N. Y., 9	667
Estate of Lyon.....	70	Iowa, 375	426
Everett v. Brown.....	64	Iowa, 420	366
Everett v. Council Bluffs...	46	Iowa, 66	439
Everett v. Los Angeles Con- solidated Elec. Co.....	115	Cal., 105	643

F

Fallon v. Chidester.....	46	Iowa, 588	19
--------------------------	----	-----------------	----

Farmer v. Cedar Rapids....	116	Iowa, 322	557
Fero v. R. R.....	22	N. Y., 213	662
Finch v. Hollinger.....	47	Iowa, 173	607
Fink v. Des Moines Ice Co..	84	Iowa, 321	524
Fire Ass'n v. Fleming.....	78	Ga., 733	377
First Nat'l Bank v. Shedd..	121	U. S., 74	331
Fish Bros. Wagon Co. v. LaBelle Wagonworks	82	Wisc., 546	5
Fisher v. Beard.....	32	Iowa, 346	79
Fisher v. Carpenter.....	36	Kan., 184	548
Fitch v. Bunch.....	30	Cal., 213	42
Fitch v. Traction Co.....	116	Iowa, 716	284, 429, 679, 733
Fitzgerald v. Conn. River Paper Co.....	155	Mass., 155	351
Flam v. Lee.....	116	Iowa, 289	377
Flanagan v. Ry. Co.....	83	Iowa, 639	171, 561
Fletcher v. Austin.....	11	Vt., 447	291
Fletcher v. Sharpe.....	108	Ind., 276	392
Florida Southern Ry. v. Hirst	30	Fla., 1	665
Foley v. Hamilton.....	89	Iowa, 686	716
Foot v. Burlington Gaslight Co.	103	Iowa, 576	448
Forbes v. Boone Valley Co.	113	Iowa, 101	149
Ford v. Easley.....	88	Iowa, 605	392
Ford v. R. R.....	110	Mass., 240	417
Foshay v. Shafer.....	116	Iowa, 302	675
Foster v. Davenport.....	109	Iowa, 329	327
Foster v. Elliott.....	33	Iowa, 216	170
Frantz v. Hanford.....	87	Iowa, 469	372
Fraser v. Red River Lum- ber Co.....	45	Minn., 235	525
Frazier v. Turner.....	76	Wisc. 562	377
French v. R. R.....	116	Mass., 537	664
Frey v. Heydt.....	116	Pa., 601	75
Frick v. Fritz.....	115	Iowa, 438	404
Fritz v. Pusey.....	31	Minn., 368	322
Frost v. Board.....	114	Iowa, 103	261
Fridickar v. Ins. Co.....	62	N. Y., 392	278
Fuller v. Tomlinson.....	58	Iowa, 111	318
Funston v. C. R. I. & P. Ry. Co.	61	Iowa, 452	118

G

Gable v. Halner.....	83	Iowa, 457	746
Gahn v. Niemcewicz's Exr's.	11	Wend., 312	289
Gallaway v. Chicago, M. & St. P. R. Co.....	56	Minn., 346	348
Gallup v. Tracy.....	25	Conn., 10	497
Gardner v. Trenary.....	65	Iowa, 646	625
Gardner v. Webster.....	64	N. H., 520	258
Garner v. Fry.....	104	Iowa, 515	331
Garrett v. Bishop.....	113	Iowa, 23	157
Garretson v. Hubbard.....	110	Iowa, 7	399
Garrity v. R. R.....	112	Mich., 369	661
Garvin v. Cannon.....	53	Iowa, 716	629
Gay v. Winter.....	34	Cal., 164	658

Gaynor v. R. R.....	100	Mass., 208	664
Gear v. Dubuque & Sioux City R. R. Co.....	20	Iowa, 523	412
Gerdes v. Weiser.....	54	Iowa, 591	417
Gee v. Moss.....	68	Iowa, 318	628
Geesen v. Sagnin.....	115	Iowa, 7	526
German Bank v. Foreman..	138	Pa., 474	392
Gibson v. Jenney.....	15	Mass., 205	265
Gibson v. Fischer.....	68	Iowa, 29	586
Gill v. Appanoose Co.....	68	Iowa, 20	270
Gill v. Sullivan.....	55	Iowa, 341	24
Gill v. Sullivan.....	62	Iowa, 529	715
Gilmore v. Ham.....	40	Am. St. Rep., 562	94
Glass v. Cedar Rapids.....	68	Iowa, 207	47
Gleason v. R. R.....	43	Mo. Rep., 517	520
Glenn v. Glenn.....	17	Iowa, 498	734
Goebel v. Hough.....	26	Minn., 252	588
Goodhart v. R. R.....	177	Pa., 1	380
Goodyear Co. v. Bacon....	151	Mass., 460	291
Gower v. Doheney.....	33	Iowa, 36	315
Grady v. McCorkle.....	57	Mo., 172	739
Grafton v. Cummings.....	99	U. S., 100	180
Gray v. Coan.....	23	Iowa, 344	170
Gregary v. Bowlsby.....	115	Iowa, 327	200
Green v. Ins. Co.....	84	Iowa, 135	85
Greenleaf v. Ill. Cent. R. Co.	29	Iowa, 14	646
Greenlee v. Mosnat.....	116	Iowa, 534	186
Greenwood Tp. v. Richard- son	62	Pac. Rep., 430	448
Grisard v. Hinson.....	50	Ark., 229	318
Gronan v. Kukkuck.....	59	Iowa, 18	681
Guggenheim v. R. R.....	66	Mich., 150	663
Gunn v. Thurston.....	130	Mo., 339	74
Gunter v. Beard.....	93	Ala., 227	323
Guthrie v. Russell.....	46	Iowa, 269	322
H			
Hackwaith v. Zollars.....	30	Iowa, 438	597
Hadley v. Boxendale.....	9	Exch., 341	587
Hall v. Ballou.....	58	Iowa, 585	482
Hall v. Norwalk Co.....	57	Conn., 105	279
Hall v. Parker.....	37	Mich., 590	290
Hall v. Rankin.....	87	Iowa, 264	342
Hall v. Smith.....	14	Bush., 604	291
Ham v. Greeve.....	34	Ind., 18	614
Hamilton v. Bishop.....	22	Iowa, 211	208
Hammatt v. Emerson.....	27	Me., 198	211
Hanners v. McClelland.....	74	Iowa, 318	617
Hanselman v. Kegel.....	60	Mich., 540	431
Hard v. Brown.....	18	Vt., 87	462
Hard v. City of Decorah...	43	Iowa, 313	546
Harger v. Spofford.....	46	Iowa, 11	372
Harney v. Charles.....	45	Mo., 157	69
Harrison v. Hartford Co....	112	Iowa, 77	200
Harrison v. Otley.....	101	Iowa, 652	399
Harshman v. Slonaker.....	53	Iowa, 467	540
Hart v. Cedar Rapids & M.			

O. R. Co.....	109	Iowa, 631	648
Hart v. Chase.....	46	Conn., 207	130
Hart v. McCollum.....	28	Ga., 478	739
Hartley v. Bartruff.....	112	Iowa, 592	448
Hartley State Bank v. Mc-			
Corkell	91	Iowa, 660	430
Hatch v. Staright.....	3	Conn., 31	75
Haughton v. C. & G. T. Ry.			
Co.	99	Mich., 308	117
Haworth v. SeEVERS Mfg. Co.	87	Iowa, 765	524
Head v. R. R.....	79	Ga., 358	380
Heath v. Mason City Co.			
Iowa	94	N. W. Rep., 467	688
Hedden v. Griffin.....	136	Mass., 229	624
Hendrickson v. R. R.....	49	Minn., 245	655
Heneschoff v. Miller.....	2	Johns., 235	565
Henry v. Martin.....	88	Wisc., 367	393
Herring v. Wickham.....	29	Grat, 628	209
Herstein v. Walker.....	50	Ala., 477	448
Hibbard v. Everett.....	65	Iowa, 372	708
Hickey v. St. Paul City R.			
Co.	60	Minn., 119	644
Hicks v. R. R.....	124	Mo., 115	682
Higby v. Whittaker.....	8	Ohio, 198	676
Hill v. Southern Pac. Co....	23	Utah, 94	524
Hilpire v. Claude.....	109	Iowa, 159	19
Hirschorn v. Bradley.....	117	Iowa, 130	586, 639
Hitchcock v. Galveston.....	96	U. S., 341	496
Hobbs v. Iowa Ben. Ass'n..	82	Iowa, 107	694
Hoffman v. Wilhelm.....	68	Iowa, 510	195
Hogan v. Jacques.....	19	N. J. Eq., 128	252
Holbrook v. Oberne.....	56	Iowa, 324	360
Hollingsworth v. Holbrook.	80	Iowa, 154	723
Holloman v. Copeland.....	10	Ga., 79	20
Holman v. Hodges.....	112	Iowa, 714	16
Holmes v. Clark.....	10	Iowa, 423	624
Home Fire Ins. Co. v. Skon-			
mal	51	Neb., 655	188
Hooker v. DePalos.....	28	Ohio St., 251	521
Hopkinson v. Knapp.....	92	Iowa, 328	651
Hopwood v. McCausland....	120	Iowa, 218	502
Horseman v. Todhunter....	12	Iowa, 230	318
Hough v. R. R.....	100	U. S., 213	524
House v. Woodard.....	5	Cald, 201	75
Howard v. Smith.....	78	Iowa, 73	345
Howard v. Stillwell.....	139	U. S., 199	587
Hoyer v. King.....	101	Iowa, 363	611
Huff v. Aultman.....	69	Iowa, 71	470
Huff v. Poweshiek Co.....	60	Iowa, 529	101
Humphrey's Ex'r. v. Wade..	84	Ky., 400	596
Hunt v. Gray.....	76	Iowa, 268	611
Hunt v. Hoover.....	34	Iowa, 77	34
Hupert v. Anderson.....	35	Iowa, 578	413
Hurleman v. Hazlett.....	55	Iowa, 256	738
Huss Ry. Co.....	113	Iowa, 343	284, 429, 634, 679
Hutton v. Lockridge.....	27	W. Va., 428	715

Ill. Cent. Ry. Co. v. City of Champaign	163	Ill., 524	413
Illingsworth v. Boston Elec- tric Light Co.	161	Mass., 583	351
Iowa City v. Johnson County	99	Iowa, 513	548
Iowa Seed Co. v. Dorr	70	Iowa, 481	5
Ind. Dist. of Boyer v. King.	80	Iowa, 497	701
Ind. Dist. v. King	80	Iowa, 498	391
Ind. School Dist. of Sioux City v. Hubbard	110	Iowa, 58	698
Ind. etc., Ry. Co. v. Drum..	21	Ill. App., 321	231
In re Carman's Will	48	N. W. Rep., 985	345
In re Bradley's Will	73	Vt., 253	92
In re Estate of Franke	97	Iowa, 704	232
In re Estate of Proctor	103	Iowa, 232	232
In re Fenton's Will	97	Iowa, 198	344
In re Hunt	141	Mass., 515	392
In re Knapp & Co.	101	Iowa, 488	391
In re Law's Estate	144	Pa., 499	391
In re Lund's Estate	107	Iowa, 264	132
In re Lyon's Estate	70	Iowa, 375	129
In re Will of Miller	73	Iowa, 118	75
Ireland v. R. R.	13	N. Y., 533	663
Iselin v. Peck	2	Robb., 629	462
Ives v. Humphreys	1	E. D. Smith, 196	380
Ivey v. Coleman	42	Ala., 409	391

J

Jack v. Weinett	115	Ill., 105	170
Jacobus v. Jacobus	37	N. J. Cq., 17	391
James v. Schroeder	61	Mich., 28	279
Jane v. Drorbaugh	63	Iowa, 711	715
Jenkins v. Walter	29	Am. Dec., 539	702
Johnson v. R. R.	20	N. Y., 65	657
Johnston v. Kimball	39	Mich., 187	290
Jones v. Cheeseborough	105	Iowa, 303	391
Jones v. Coal Co.	47	Iowa, 35	687
Jones v. Florence M. Co.	66	Wisc., 268	419
Jones v. Ry.	144	Pa., 629	728
Jones v. Witonsek	114	Iowa, 14	371
Jordan v. State Ins. Co.	64	Iowa, 216	303
Josselyn v. McAllister	22	Mich., 300	378
Journe's Succession	21	LaAnn, 391	5
Joy v. Bitzer	77	Iowa, 74	635
Juniata B. & L. A. v. Mixell	84	Pa., 313	529
Just v. Porter	64	Mich., 565	431

K

Kansas Co. v. Salmon	14	Kan., 512	565
Karmuller v. Krotz	18	Iowa, 352	256
Kaufman v. Farley	78	Iowa, 679	639
Kean v. Mitchell	13	Mich., 207	170
Keans v. Rankin	2	Pubb., 88	277
Kelley v. Owens	120	Cal., 502	675
Kellog v. Aherin	48	Iowa, 299	299

Kelly v. Wakefield & S. Str.			
R. Co.	175	Mass., 331	644
Kendall v. City of Albia....	73	Iowa, 241	153, 568
Kennedy v. Bank.....	119	Iowa, 123	453
Kennedy v. Mins.....	52	Mich., 163	715
Kennedy v. Medrow.....	1	Dall, 415	739
Kenosha Stove Co. v. Shedd	82	Iowa, 540	208
Kephart v. Bank.....	4	Mich., 602	265
Kepple v. Keokuk.....	61	Iowa, 653	556
Kern & Son v. Wilson....	73	Iowa, 490	429
Kervick v. Mitchell.....	68	Iowa, 273	508
Ketchum v. Larkin.....	88	Iowa, 215	629
Keyes v. Cedar Rapids....	107	Iowa, 509	335
Keys v. Keys.....	58	Tenn., 425	740
Kilmer v. Gallaher.....	112	Iowa, 583	576
Kimball v. Bryan.....	56	Iowa, 632	565
Kimball v. Friend's Adm'r..	95	Va., 139	658
King v. Dickson.....	114	Iowa, 160	551
King v. International, etc..	170	Ill., 135	493
King v. Sioux City, etc., Co.	76	Iowa, 11	195
King v. Talbot.....	40	N. Y., 76	391
Kinney v. McDermott.....	55	Iowa, 674	520
Kirby v. Gates.....	71	Iowa, 100	706
Kirchman v. Coal Co.....	112	Iowa, 668	420
Knapp v. R. R.....	71	Iowa, 41	171, 417
Knutter v. N. Y. & N. J.			
Tel. Co.....	52	Atl. Rep., 565	526
Kraus v. Meyer.....	32	Iowa, 566	360
Krenziger v. R. R.....	73	Wisc., 158	377
Krenger v. Sylvester.....	100	Iowa, 647	480
Kruger v. Walker.....	94	Iowa, 511	724
L			
Lacy v. Kossuth Co.....	106	Iowa, 23	462
Ladner v. Balsley.....	103	Iowa, 674	628
Lafferty v. Jelley.....	22	Ind., 471	520
Lamb v. Sherman.....	19	Neb., 687	313
Lampman v. Bruning.....	120	Iowa, 167	569
Larson v. McClure.....	95	Wisc., 533	526
Latham v. Myers.....	67	Iowa, 519	217
Lavassar v. Washburne....	50	Wisc., 200	209
Laverenz v. C. R. I. & P.			
Ry. Co.....	56	Iowa, 689	118
Lawler v. Hartford Str. R.			
Co.	72	Conn., 74	648
Law's Estate.....	144	Pa., 499	699
Lawson v. Bachman	81	N. Y., 616	678
Lawson's Appeal.....	23	Pa., 85	74
Leach v. Germania Bld'g			
Ass'n	102	Iowa, 125	448
Leary v. Boston & A. R. Co.	135	Mass., 580	350
Leather Co. v. Porter.....	94	Iowa, 117	180
Lee v. C. R. I. & P. Ry Co..	80	Iowa, 12	115
Lee v. Percival.....	85	Iowa, 639	222
Leeds v. Lockwood.....	84	Pa., 70	565
Leffingwell v. Grand Lodge.	86	Iowa, 279	691
Leighton v. Orr.....	44	Iowa, 679	346

Leits v. McMaster.....	83	Iowa, 449	708
Leman v. Whitley.....	4	Russ, 423	252
Lent v. Padelford.....	10	Mass., 230	670
Levi v. Karrick.....	15	Iowa, 444	447
Liddle v. Allen.....	90	Iowa, 738	735
Lindsey v. Moore.....	101	Iowa, 592	638
Lindvall v. Woods.....	41	Minn., 212	525
Littig v. Hance.....	81	Md., 416	91
Loeffler v. Modern Woodmen	100	Wisc., 79	694
Long v. Emsley.....	57	Iowa, 11	392, 702
Long v. Hewitt.....	44	Iowa, 363	24
Long v. Smith.....	62	Iowa, 329	69, 70, 112
Longshore v. Jack.....	30	Iowa, 298	628
Lorenz v. Burlington C. R. & N. Ry. Co.....	115	Iowa, 377	118
Loring v. Grooner.....	110	Mo., 632	257
Louisville N. A. & C. R. Co. v. Corps.....	124	Ind., 427	350
Louisville R. R. v. Goetz's Admx.	79	Ky., 442	658
Lovejoy v. Morrison.....	10	Minn., 136	323
Lowry v. Polk Co.....	51	Iowa, 50	392, 702
Lucore v. Kramer.....	22	Iowa, 387	371
Lurch v. Holder.....	27	Atl. Rep., 81 (N. J.).....	677
Lyman v. Cessford.....	15	Iowa, 232	208
Lyman v. R. R.....	66	N. H., 200	656
Lynn v. Morse.....	76	Iowa, 665	69
Lyon v. Tevis.....	8	Iowa, 79	624
Lyons v. Lancaster.....	12	Ky., 434	715
Mc			
McAffee v. Bland	11	Ky., 1	394
McBain v. McBain.....	15	Ohio St., 337	313
McBride v. R. R.....	19	Or., 64	655
McBride v. Ricketts.....	98	Iowa, 539	360
McBurney v. Graves.....	66	Iowa, 314	580
McCall v. Webb.....	126	N. C., 760	448
McCarthy v. White.....	21	Cal., 495	209
McClenahan v. Stevenson..	118	Iowa, 106	253
McConnell v. Osage.....	80	Iowa, 293	582
McCorkendale v. McCorken- dale	111	Iowa, 314	76
McCormick v. Bay City....	23	Mich., 457	292
McCormick v. Bishop.....	3	G. Greene, 99.....	236
McCormick H. M. Co. v. Col- liver	75	Iowa, 559	309
McCormick v. Hanks.....	105	Iowa, 639	426
McCracken v. R. Co.....	91	Iowa, 711	565
McCue v. Wapello Co.....	56	Iowa, 698	51
McCullom v. McKenzle....	26	Iowa, 510	19
McDearman v. Hodneit....	83	Va., 281	74
McElhenny v. Hendricks...	82	Iowa, 657	746
McElhenny v. Hedricks....	82	Iowa, 659	344
McFaddin v. Heffly.....	28	S. C., 317	91
McFarland v. Lindekugel...	107	Wisc., 474	79
McGee v. Consolidated Str. R. Co.....	102	Mich., 107	647

McGillivray v. Case.....	107	Iowa, 17	420
McGlaughlin v. O'Rourke...	12	Iowa, 459	447
McGlothlin v. Hite.....	55	Iowa, 392	131
McGovern v. Union Traction Co.	192	Pa., 344	647
McIntire v. Eastman.....	76	Iowa, 455	430
McKay v. Smith.....	27	Wash., 442	69
McKee v. Eaton.....	26	Kan., 226	676
McKown v. Ferguson.....	47	Iowa, 636	625
McLain v. Wallace.....	103	Ind., 562	393
McLeery v. McLeery.....	65	Me., 173	742
McMahill v. McMahonill.....	69	Iowa, 115	130
McMarshall v. C. R. I. & P. Ry. Co.....	80	Iowa, 757	115
McMasters v. Ins. Co. (CC)	90	Fed. Rep., 40	691

M

Mackerall v. R. R. Co.....	111	Iowa, 547	653
Madigan v. Walsh.....	22	Wisc., 501	738
Mahana v. Blunt.....	20	Iowa, 142	178
Mahaska County Bank v. Crist	87	Iowa, 415	194
Maher v. Thropp.....	59	N. J. Law, 186	526
Mahoney v. Dore.....	155	Mass., 513	351
Mallory v. Montgomery Co.	48	Iowa, 681	496
Malone v. McClain.....	3	Ind., 532	715
Manhattan Co. v. Richards.	13	S. D., 377	69
Marble v. Price.....	54	Mich., 466	740
Marden v. Hotel Ins. Co...	85	Iowa, 584	302
Markland v. Kimmel.....	87	Ind., 572	291
Marion v. Heimbach.....	62	Minn., 214	186
Marsh v. Herman.....	47	Minn., 537	525
Martin v. Chgo. R. I. & P. R. Co.	118	Iowa, 148	350
Martin v. Harnsby.....	55	Minn., 187	290
Martin v. Lemon.....	26	Conn., 192	497
Martin v. Meyer.....	112	Ala., 620	462
Martin v. Town of Algona..	40	Iowa, 390	73
Mason v. Mason.....	140	Mass., 63	739
Mather v. Butler Co.....	16	Iowa, 59	565
Meeker v. Meeker.....	74	Iowa, 352	345
Mellichar v. City.....	116	Iowa, 390	687
Merkel's Appeal.....	89	Pa., 340	73
Merrill v. Hole.....	85	Iowa, 66	603
Merrill v. Packer.....	80	Iowa, 542	203
Metz v. St. Paul City R. Co.	92	N. W. Rep. (Minn.), 502....	647
Michels v. Ins. Co.....	129	Mich., 417	278
Middleton v. Middleton....	31	Iowa, 151	130
Middleton v. Middleton....	31	Iowa, 153	73
Mid. Nat. Bank v. Richards	55	Neb., 682	289, 291
Miehills M. Co. v. Day.....	50	Iowa, 252	323
Milburn v. City of Cedar Rapids	12	Iowa, 246	544
Milburn v. Milburn.....	60	Iowa, 411	19
Miller v. Pence.....	131	Ill., 122	739

Miner v. Conn. River R. Co.	153	Mass., 398	350
Mining Syndicate v. Fraser.	130	U. S., 611	587
Minneapolis & St. L. Ry. Co. v. Town of Britt.....	105	Iowa, 198	546
Missouri Pac. Ry. Co. v. Manson	31	Kan., 337	230
Missouri Pac. Ry. Co. v. Morrow	32	Kan., 217	230
Mock v. Watson	41	Iowa, 241	132
Moehn v. Moehn.....	105	Iowa, 710	74
Moffatt v. Fulton.....	132	N. Y., 507	170
Moriarity v. Boone Co.....	39	Iowa, 634	672
Moore v. C. St. P. & K. C. Ry. Co.....	102	Iowa, 595	116, 648
Moore v. Frost.....	3	N. H., 126	739
Moore v. Jeffers.....	53	Iowa, 202	607
Moore v. R. R. Co.....	102	Iowa, 595	653
Moore v. R. R.....	102	Iowa, 597	600
Moorehead v. Hyde.....	38	Iowa, 382	5
Moreland v. Metz.....	24	W. Va., 119	322
Morgan v. Perhamus.....	36	Ohio St., 522	5
Morgan v. R. R.....	95	Cal., 501	350
Morrill v. B. & M. R. Co....	58	N. H., 68	678
Morris v. Council Bluffs....	67	Iowa, 343	558
Morris v. Posner.....	111	Iowa, 335	508
Morris v. R. R.....	45	Iowa, 30	380
Morris v. Sargent.....	18	Iowa, 90	307
Morrison v. Dingley.....	63	Me., 553	403
Mosgrove v. Zimbleman....	110	Iowa, 171	154
Morse v. Marshall.....	22	Iowa, 290	708
Morse v. Seibold.....	147	Ill., 318	740
Mosness v. German Ins. Co.	50	Minn., 341	278
Moyer v. R. R.....	98	N. Y., 646	567
Mullen v. Morris.....	43	Neb., 591	291
Mundle v. Hill Mfg Co. ...	86	Me., 400	350, 351
Munns v. Donoran	117	Iowa, 516	521
Munster v. Chicago M. & St. P. Ry. Co.	61	Wisc., 325	348
Murdough v. Revere	165	Mass., 109	496
Murphy v. First Nat. Bank.	95	Iowa, 325	611
Murray v. Mo. R. R. Co....	101	Mo., 236	171
Myers v. Kirt, et al.....	68	Iowa, 124	565
Myrming v. R. R.....	64	Mich., 93	655
N			
Nadan v. White R. L. Co..	76	Wisc., 120	417
Nalpter v. Dolan.....	108	Ind., 500	702
Nat'l Bank v. Millard	10	Wall, 153	393
Nash v. Fugate	24	Grat., 213	291
Neenan v. Smith.....	50	Mo., 525	265
Negus v. Negus.....	46	Iowa, 487	19
Neininger v. State.....	50	Ohio St., 394	716
Nelson v. Goody Koontz....	47	Iowa, 32	412
New England R. Co. v. Con- roy	175	U. S., 323	526
Newans Case	79	Iowa, 32	540
Newark, etc., Ry. v. Block.	55	N. J. Law, 605	658, 661

Newbury v. Getchell & M. Lumber Co.	100	Iowa, 441	526
Newhard v. R. R.	153	Pa., 417	662
Nichols v. Ins. Co.	22	Wend, 125	277
Nicholaus v. R. R.	30	Iowa, 85	417
Nixon v. Downey	49	Iowa, 166	548
Noble v. Bulles	23	Iowa, 559	69
Noble v. Rd.	61	Iowa, 637	686
Nolan v. Jones	53	Iowa, 387	508
Noonan v. Braley	67	U. S., 499	79
Nordine v. Rosengreen	89	N. W. Rep., 103 (Iowa) ..	284, 679
Norris v. Kipp	74	Iowa, 444	624
Northern R. R. v. State	31	Md., 357	658
Norwood v. Harness	98	Ind., 134	391, 709
Novelty Ironworks v. Oatmeal Co.	88	Iowa, 524	588
Nugent v. Traction Co.	181	Pa., 160	647
N. Y. Ins. Co. v. Davis	96	Va. 737	209
N. Y. Lumber Co. v. Schneider	119	N. Y., 475	278
O			
O'Conner v. Nolan	64	Ill. App., 357	323
Officer v. Officer	120	Iowa, 389	700
Ogden v. Buckley	116	Iowa, 352	16
O'Konski v. Penn. & O. Coal Co.	114	Wisc., 448	526
Oleson v. Maple Grove Coal & Mining Co.	115	Iowa, 74	525
Olewine v. Messmore	123	Pa., 434	740
O'Neil v. VanTossel	137	N. Y., 297	332
Opp v. Ten Eyck	99	Ind., 345	715
Ornman v. Mannix	17	Colo., 564	170
Orr v. Ry.	94	Iowa, 426	658
Osborn v. Osborn	29	N. J. Eq., 385	252
Ostrander v. Scott	161	Ill., 339	186
P			
Padelford v. Eagle Grove ..	117	Iowa, 616	101
Palmer v. Clark	114	Iowa, 558	420
Palmer v. Osborne	115	Iowa, 714	546
Palmer v. R. R.	113	Iowa, 442	617
Paola Gas Co. v. Paola Glass Co.	56	Kan., 614	388
Pardey v. Mechanicsville ..	112	Iowa, 68	562
Parker v. Nothomb. (Neb.) ..	93	N. W. Rep., 851	265
Parkhurst v. Johnson	50	Mich., 70	419
Parsons v. Gilbert	45	Iowa, 36	222
Parsons v. Parsons	66	Iowa, 754	548
Paton v. Lancaster	38	Iowa, 494	624
Patterson v. Townsend	91	Iowa, 725	647
Patton v. Patton	55	N. C., 494	92
Paul v. Draper	158	Mo., 197	393
Pawling v. U. S.	4	Cranch, 219	291
Paxton v. Boyce	1	Texas, 317	209
Payne v. C. & N. W. R. Co. ..	108	Iowa, 188	115
Payne v. Raublek	82	Iowa, 587	203
Peak v. Ellicott	30	Kan., 156	392

Pearson v. Robinson.....	44	Iowa, 413	69, 112
Peck v. Burr	10	N. Y., 294.....	520
Peden v. Ry. Co.	73	Iowa, 333	215
Penn R. R. v. Weber.....	76	Pa., 157	656
Pennypacker v. Jones.....	106	Pa., 237, 242	587
Pense v. Hixon.....	8	Iowa, 402	741
People v. Bank.....	96	N. Y., 33	392
People's Bank Ass'n v. Billing	104	Mich., 186	529
People v. Faulkner	107	N. Y., 488	391
People v. Hartley.....	21	Cal., 585	291
People v. Sweeny.....	55	Mich., 586	243
Peoria Co. v. Babcock (CC)	67	Fed. Rep., 892	180
Perkins v. Perkins.....	116	Iowa, 253	42, 345
Petherick v. Order.....	114	Mich., 420	691
Pettit v. Inc. Town of Grand Junction	119	Iowa, 352	215
Phelps v. Samson.....	113	Iowa, 145	508
Phillips v. Phillips.....	90	Iowa, 541	73, 130
Phillips v. R. R.....	77	Wisc., 349	656
Pillsbury v. Kistler.....	53	Minn., 123	253
Pioneer Fireproof Const. Co. v. Howell	169	Ill., 126	524
Pitts v. Clay	27	Fed. Rep., 635	672
Pollman, Etc., Co. v. St. Louis	145	Mo., 651	186
Porter v. Beattie.....	88	Wisc., 22	677
Porter v. Bradley.....	7	R. I., 538	322
Porter v. Curtis.....	96	Iowa, 539	360
Porter v. Waring.....	69	N. Y., 250	546
Porter v. Wilson.....	4	G. Greene, 314	372
Pothast v. C. & G. G. Ry..	110	Iowa, 458	227
Potter v. Brown.....	11	R. I., 232	20
Powell v. Olds.....	9	Ala., 861	73
Powers v. City of Council Bluffs	45	Iowa, 652	215
Prather v. West Union Tel. Co.	89	Ind., 501	727
Prendergast v. Walsh.....	58	N. J. Eq., 149	91
Pritchard v. Hopkins.....	52	Iowa, 120	208
Prosser v. Jones.....	41	Iowa, 674	323
Pruzman v. Baker.....	30	Wisc., 644	42
Puhr v. Grand Lodge.....	77	Mo. App., 47	691
Pyland v. State.....	33	Tex. Cr. App., 382	37

Q

Quillan v. Windsor.....	6	Iowa, 396	236
Quinton v. Burton.....	61	Iowa, 471	439

R

Rabbit v. Dollen.....	14	Nev., 19	209
Railway Co. v. Bodemer...	139	Ill., 596	665
Railway Co. v. Hall.....	37	Iowa, 620	735
Railway Co. v. Miller.....	59	N. J. Err. & App., 423	664
Rau v. Minn. Val. R. Co..	13	Minn., 442 (Gil 407).....	566
Raymond v. Cox.....	44	N. J. Eq., 415	209
Read v. American Surety Co.	117	Iowa, 591	317

Reddin v. Gates	52	Iowa, 210	581
Reed v. C., St. P. M. & Q. R. Co.	74	Iowa, 188	115
Reed v. Murphy	2	G. Green, 574	360
Reilly v. Ft. Dodge	118	Iowa, 663	556
Reno v. City of Iolo	63	Kan. Sup., 885	80
Rex v. Hughes	14	Cox Cr. Cas., 223	39
Reynolds v. City of Keokuk ..	72	Iowa, 372	650
Reynolds v. Plymouth Co. ..	55	Iowa, 90	672
Rhodes v. Town of Bright- wood	145	Ind., 21	80
Rhodes v. Weldy	46	Ohio St., 234	20
Rice v. Angell	73	Tex., 350	5
Rice v. Plymouth Co.	43	Iowa, 136	496
Rich v. Block	68	Iowa, 526	323
Richards v. Grinnell	63	Iowa, 44	360
Richards v. Monroe	85	Iowa, 359	203
Richardson v. Webster City ..	111	Iowa, 427	439, 558
Richman v. Board, Etc.	70	Iowa, 627	629
Rickert v. Snyder	9	Wend, 416	322
Rider v. Portsmouth	76	N. H., 298	496
Ridgway v. Hills	66	Ind., 475	181
Ringo v. Field	6	Ark., 43	393
Ritchie v. Zalesky	38	Iowa, 589	155, 157, 467
Robbins v. Clark	129	Mass., 145	278
Robbins v. R. R.	165	Mass., 30	664
Roberts v. People	19	Mich., 401	243
Roberts v. R. R.	23	Wash., 325	661
Robinson v. Berkey	100	Iowa, 136	420
Robinson v. Coffin	2	Wash T., 251	548
Rockwell v. Bowers	88	Iowa, 88	413
Rogers v. City of St. Charles ..	3	Mo. App., 41	413
Rogers v. Ludlow	144	Mass., 198	417
Roll v. City of Indianapolis ..	52	Ind., 547	444
Root v. Sturdivant	70	Iowa, 58	377
Ross v. Clinton	46	Iowa, 606	558
Ross v. Hatch	5	Iowa, 149	701
Ross v. Walker	139	Pa., 42	525
Ruddick v. Otis	33	Iowa, 402	359
Rule v. McGregor	117	Iowa, 419	586
Rumbly v. Stainton	24	Ala., 712	75
Ruthven v. Am. Fire Ins. Co ..	102	Iowa, 550	138
Rutland Co. v. Ripley	10	Wall, 339	222

S

Sacramento v. Dunlap	14	Cal., 421	291
Salisbury v. Clark	61	Vt., 453	252
Salter v. City of Burlington ..	42	Iowa, 531	68
Sanderson v. Tinkham	83	Iowa, 446	460
Sayre v. Wheeler	31	Iowa, 112	521
Schmidt v. Supreme Tent ..	97	Wisc., 528	694
Schoening v. Schwenck	112	Iowa, 733	92
Schofield v. Blind	83	Iowa 175	208
Schoonover v. Osborne	108	Iowa 453	327
Scott v. Ins Co.	96	Iowa, 67	303
Schroepell v. Shaw	3	N. Y., 457	318
Schum v. R. R.	107	Pa., 12	656

Seerley v. Sater.....	68	Iowa, 375	393
Selverts v. Ben Ass'n.....	95	Iowa, 710	694
Sell v. Miss. R. Logging Co	88	Wisc., 581	170
Shannon v. Tama City....	74	Iowa, 23	580
Sharp v. U. S.....	4	Watts, 21	291
Shaw v. Bauman.....	34	Ohio St., 25	393
Shaw v. Chgo. & G. T. R. Co.	123	Mich., 629	348
Shea v. City of Ottumwa..	67	Iowa, 39	79
Shea v. Milford.....	145	Mass., 528	496
Shea v. R. R.....	50	Minn., 395	663
Sheaffer v. Eakman.....	56	Pa., 144	740
Shearer v. Weaver.....	56	Iowa, 585	24
Sheasly v. Keens.....	48	Neb., 57	314
Sheldon v. Root.....	16	Pick, 567	462
Shell v. Duncan.....	31	S. C., 547	741
Shepard v. Ry.....	71	Iowa, 54	335
Sherraden v. Parker.....	24	Iowa, 28	311
Sherwood v. Smith.....	23	Conn., 516	74
Shirly v. Ayres.....	14	Ohio, 317	42
Shoemaker v. Lacey.....	38	Iowa, 277	69
Shoemaker v. Turner.....	117	Iowa, 340	634
Sigler v. Murphy.....	107	Iowa, 128	372
Siltz v. Hawkeye Ins. Co..	71	Iowa, 710	303
Sioux City v. Wearre	59	Iowa, 95	496
Sisson v. Kaper.....	105	Iowa, 599	604
Slack v. Suddoth.....	102	Tenn., 375	4
Sloane v. R. R.....	111	Cal., 668	380
Slocumb v. C. B. & Q. Ry.			
Co.	57	Iowa, 675	535
Slocumb v. Ry.....	57	Iowa, 675	729
Smith v. Allen.....	1	N. J. Eq., 43	716
Smith v. Bogenschutz.....	14	Ky., 305	565
Smith v. Bricker.....	86	Iowa, 285	673, 677
Smith v. City & Suburban			
R. Co.	29	Or., 539	643
Smith v. Crosby.....	86	Tex., 15	596
Smith v. Des Moines.....	84	Iowa, 685	582
Smith v. Electric Traction			
Co.	187	Pa., 110	643
Smith v. Gibbs.....	44	N. H., 343	5
Smith v. Miller.....	105	Iowa, 688	12
Smith v. Myers.....	7	Ky. Law Rep., 443	739
Smith v. Palmer.....	6	Cush, 513	565
Smith v. Union Trunk Line	18	Wash., 351	658
Smith v. Wehrle.....	41	W. Va., 270	739
Smizel v. Odanah Iron Co..	116	Mich., 149	524
Sneathen v. Grubbs.....	84	Pa., 147	403
Snow v. Fitchburg R. Co.,	136	Mass., 552	348
Snyder v. Phillips.....	66	Iowa, 481	512
Snyder v. Tibbals.....	32	Iowa, 447	403
Soorholtz v. Farmer's M. E.			
Ins. Co.	109	Iowa, 522	83
Souhegan Bank v. Wallace	61	N. H., 24	521
South v. Bees.....	82	Ala., 340	565
Southern R. R. v. Bryant's			
Adm'r	98	Va., 221	658

Spaulding v. R. Co.....	98	Iowa, 212	153
Squire v. Harder.....	1	Page, 494	252
St. Louis, Etc. v. Trimble..	54	Ark., 354	379
Stacy v. Winona, Etc. Ry. Co.	42	Minn., 158	230
Stahl v. Duluth.....	71	Minn., 341	524
Stambaugh v. Smith.....	23	Ohio St., 584	597
Staples v. Plymouth Co....	62	Iowa, 364	270
State v. Akin.....	94	Iowa, 50	247
State v. Allen.....	69	Miss., 508	292
State v. Ashbury Park....	62	N. J. Law, 158	496
State v. Beanbout.....	100	Iowa, 155	247
State v. Brainard.....	25	Iowa, 572	241
State v. Brown.....	100	Iowa, 54	617
State v. Brundige.....	118	Iowa, 92	9
State v. Bussamus.....	108	Iowa, 11	157
State v. Cater.....	100	Iowa, 501	247
State v. City of Keokuk....	9	Iowa, 439	413
State v. Cody.....	94	Iowa, 169	247
State v. Donahue.....	120	Iowa, 154	467
State v. Franks.....	51	Mo., 98	716
State v. Gifford.....	111	Iowa, 648	157
State v. Green.....	8	Neb., 299	313
State v. Grinden.....	91	Iowa, 505	166
State v. Gunagy.....	81	Iowa, 177	169
State v. Haarle.....	26	N. W. Rep., 906	290
State v. Helm.....	97	Iowa, 378	335
State v. Hill.....	47	Neb., 456	700
State v. Jarvis.....	21	Iowa, 44	246
State v. Jelinek.....	95	Iowa, 420	37
State v. Jennings.....	79	Iowa, 513	39
State v. Keasling.....	74	Iowa, 528	243
State v. Knight.....	43	Me., 1	567
State v. McCombs.....	13	Iowa, 426	166
State v. McFetridge.....	84	Wisc., 473	700
State v. Morphy.....	33	Iowa, 270	568
State v. Morris.....	43	Iowa, 192	142
State v. O'Hogan.....	38	Iowa, 504	241
State v. Porter.....	34	Iowa, 131	568
State v. Pressman.....	103	Iowa, 452	155
State v. Rainsberger.....	74	Iowa, 204	567
State v. Rivers.....	68	Iowa, 611	37
State v. Schele.....	52	Iowa 608	246
State v. Scripture.....	42	N. H. 485	37
State v. Seymour.....	94	Iowa 705	568
State v. Sherman.....	46	Iowa, 415	47
State v. Speyer.....	67	Vt. 502	27
State v. Stanley.....	48	Iowa 221	166
State v. Sterrett.....	80	Iowa, 609	247
State v. VanVliet.....	92	Iowa 476	155. 467
State v. White.....	45	Iowa 325	246
State Bank v. Bartle.....	114	Mo. 276	317
State Bank v. Green.....	10	Neb., 130	313
Steel v. Long.....	84	N. W. Rep., 677	447
Steele v. Gellatly.....	41	Ill. 39	739
Steever v. R. R.....	62	Iowa 371	520

Steinback v. Stewart.....	11	Wall 566	447
Stephens v. Capital Ins. Co.	87	Iowa 283	302
Stetson v. Northern Invest-			
ment Co.	104	Iowa 393	327
Stevens v. Hewitt.....	30	Vt. 263	565
Stevens v. Murphy.....	91	Iowa 356	113
Stewart v. Cage.....	59	Miss. 558	597
Stillman v. Rosenberg.....	111	Iowa 322	447
Stohr v. San Fran. Mus.			
Soc. (Cal.)	22	Pac. Rep., 1125.....	694
Stomme v. Produce Co....	108	Iowa, 140	419
Stone v. Heywood.....	7	Allen 118	379
Stout v. Ennis.....	28	Kan. 706	521
Strauss v. Ass'n.....	126	N. C., 971	694
Stretch v. Cassopolis.....	125	Mich. 167	439
Strunk v. Pritchett	27	Ind. App., 582.....	79
Sullivan v. R. R. Co.....	107	Mo., 66	419
Sullivan v. State	59	Ark., 47	317
Summers v. Reynolds	95	N. C., 404	702
Sumrall v. Columbia F. & T.			
Co.	20	Ky. 1801	493
Sumrall v. Reid	32	Ky., 65	715
Supreme Com. v. Ainsworth	71	Ala., 449	694
Swails v. Swails	98	Ind., 511	92
Swanson v. Allen.....	108	Iowa 419	419
Sweeny v. Ins. Co.....	19	R. I., 171	210
Swope v. Prior.....	58	Iowa 412	112

T

Tabbutt v. Grant.....	94	Me., 371	258
Tallant v. Burlington Gas-			
light Co.	36	Iowa 262	371
Tanner v. Merrill.....	108	Mich., 58	186
Taraldson v. Town of Lime			
Springs	92	Iowa 188	547
Taylor v. Lawrence.....	148	Ill., 388	39
Taylor v. Lusk.....	9	Iowa 444	706
Taylor v. Ormsby.....	66	Iowa 112	70
Taylor v. Star Coal Co....	110	Iowa 47	149
Teabout v. Jeffrey.....	74	Iowa 28	69
Terrien v. St. Paul City R.			
Co.	70	Minn., 532	644
Tesch v. R. R.....	108	Wis., 593	662
Thayer v. Partridge.....	21	Vt. 423	735
Thistlewaits v. Thistlewaits	132	Ind., 355	75
Thorson v. Baker.....	107	Iowa 49	635
Thomas v. Desney.....	57	Iowa 58	256
Thomas v. Quartermaine...	18	Q. B. D., 685.....	350, 351
Thompson v. Blanchard....	2	Iowa 44	278
Thompson v. McCorkle....	136	Ind., 484	739, 471
Thompson v. Ry. Co.....	70	Minn., 219	417
Thompson v. Whipple.....	54	Ark., 203	378
J. Thompson & Sons Mfg.			
Co. v. Perkins & Sons....	97	Iowa 607	169
Thornton v. McCormick....	75	Iowa 285	274
Thornton v. Mulquinne....	12	Iowa 549	597

Tibbets v. Langley.....	12	S. C., 465	742
Tisdale v. Conn. Mut. Life Ins. Co.	28	Iowa 12	427
Tomlinson v. Hammond....	8	Iowa 40	278
Town of Woodruff Place v. Rashig	174	Ind., 517	80
Trammell v. Swan.....	25	Tex., 473	614
Trish v. Newell.....	62	Ill., 196	341
Trustees v. Anamosa.....	76	Iowa 538	557
Tufts v. McClure.....	40	Iowa 317	307
Turner v. Younker.....	76	Iowa 258	430
Tweedy v. Freemont Co....	99	Iowa 721	270
Tyler v. Carlisle.....	79	Me., 210	520
Tyler v. Hall.....	106	Mo., 313	42
Tyler v. Reynolds.....	53	Iowa 146	24

U

Union Mercantile Co. v. Chandler	90	Iowa 650	576
Union Mill Co. v. Prenzler.	100	Iowa 540	371
Unitarian Soc. v. Tufts....	151	Mass., 76	91
U. S. v. Boyd.....	15	Pet., 187	289
U. S. v. Buzzo.....	18	Wall 125	243
U. S. v. Jones.....	26	Fed. Gas., 638, 15,492	447

V

Valter v. Blavka.....	195	Ill., 610	250
Vanfleet v. Phillips.....	11	Iowa 558	455
Van Sandt v. Dows.....	63	Iowa 594	371
Van Wagner v. Van Nostrand	19	Iowa 422	322
Van Werden v. Life Ins. Society	99	Iowa, 621	182
Varick v. Briggs.....	6	Page 323	265
Varnham v. Council Bluffs.	52	Iowa 698	171
Vaughn v. Smith.....	58	Iowa 553	180
Vonderbank v. Smith.....	44	La Ann 264	4
Vorse v. Phillips.....	37	Iowa 428	309, 576

W

Walker v. Tirrell.....	101	Mass., 257	460
Walker v. R. R.....	81	Minn., 404	658
Walkley v. Clark.....	107	Iowa 451	746
Walsh v. Baillie.....	10	Johns 180	289
Walters v. Ins. Co.....	1	Iowa 404	707
Ware v. Hawley.....	68	Iowa 633	371
Ware Co. v. Anderson.....	107	Iowa 231	150
Wardlow v. Steele.....	42	Tenn., 573	715
Warner v. Wilson.....	73	Iowa, 719	366
Warne v. Boston & M. R. R.	138	Mass., 484	351
Warwick v. Sup. Conclave.	107	Ga., 115	691
Wasserman v. Sloss.....	117	Cal. 425	520
Waterman v. Hawkins.....	63	Me., 156	20

Watkins v. Suter.....	11	Ky., Law. Rep., 762	715
Watkins v. Union Traction Co.	194	Pa., 564	647
Watkins v. Young.....	31	Grat., 84	74
Watson v. Minn'pls. Str. R. Co.	53	Minn., 551	648
Watson v. Mound City Str. R. Co.	133	Mo., 246	648
Watson v. Poulson.....	7	Eng. Law & Eq., 588	210
Watson v. Richardson.....	110	Iowa, 698	315, 147
Watson v. Riskamire.....	45	Iowa 231	723
Watt v. Wisc. Cranberry Co.	63	Iowa 730	180
Way v. Ill. Cent. Ry. Co....	40	Iowa 341	646
Welch v. Burris.....	29	Iowa 186	217
Welch v. Jugenheimer.....	56	Iowa 11	469
Welch v. Spies.....	103	Iowa 389	403
Weller v. Hawes.....	49	Iowa 45	576
Werborn v. Pinney.....	76	Ala., 291	447
West v. Beck.....	95	Iowa 520	130
Westcott v. Westcott.....	75	Iowa 628	74
Western Gas Const. Co. v. Danner	36	C. C. A., 528	172
Western Stage Co. v. Walk- er	2	Iowa 504	94
Wetherbee v. Bennett.....	2	Allen 428	322
Weymouth v. County Com- missioners	108	Mass., 142	498
Wheelock v. Madison Co....	75	Iowa 147	47
White v. Franklin Bank....	22	Pick 181	520
White v. Trotter.....	53	Am. Dec., 112	209
White v. Winchester.....	6	Pick, 48	92
Whitehouse v. American Surety Co.	117	Iowa 328	317
Whitsett v. R. R.....	67	Iowa 158	650
Wickham v. Winchester....	75	Iowa 327	503
Wilkins v. Bevier.....	43	Minn., 213	596
Willard's Estate.....	68	Pa., 327	20
Williams v. Courtney	77	Mo., 588	739
Williams v. C. R. I. & P. R. R.	53	Iowa 126	521
Williams v. Farrand.....	88	Mich., 473	5
Williams v. Souter.....	7	Iowa 435	361
Williams v. Williams.....	32	Beav., 370	75
Williams v. Williams.....	108	Iowa 91	250
Williams v. Williams.....	55	Wisc., 300	391, 702
Williams v. Williams.....	89	Ky., 381	739
Wilmer v. Farris	40	Iowa 309	178
Wilson & Gustin v. Jeffer- son Co.	13	Iowa 181	143
Wilson v. Hardesty.....	48	Iowa 515	131
Wilson v. People of Colo..	19	Colo., 199	701
Winey v. R. R. Co.....	92	Iowa 622	653
Winters v. DeTurk.....	133	Pa., 359	740
Winters v. Pipher.....	96	Iowa 17	360
Winters v. Winters.....	102	Iowa, 53	643

Wolmerstadt v. Jacobs....	61	Iowa 372	706
Wong Wai v. Williamson (CC)	103	Fed. Rep., 1	27
Wood v. Locke.....	147	Mass., 604	350
Wood v. Sampson.....	2	Pick 24	290
Woods v. Hilderbrand.....	45	Mo., 284	723
Woodward v. Startwell....	129	Mass., 214	596
Woolheather v. Risley....	38	Iowa 486	469
Wright v. Mahaffey.....	76	Iowa 96	327
Wright v. Tichenar.....	104	Ind., 185	739
Woutilla v. Duluth.....	37	Minn., 153	419
Wynkoop v. Burger.....	12	Johns 222	258

Y

Yeazel v. White.....	40	Neb., 432	313
York County v. Watson...	15	S. C., 1	701
Young v. Broadvent.....	23	Iowa 539	372
Young v. Charnquist.....	114	Iowa 116	17
Young v. Deputron (CC)..	37	Fed. Rep., 46	313
Young v. W. W. Tel. Co....	107	N. C., 370	380
Youngerman v. Long.....	95	Iowa 185	565

Z

Zalesky v. Ins. Co.....	108	Iowa, 341	279
Zelle v. Webster City....	34	Iowa 393	439

Statutes Cited, Construed Etc.

IN THE OPINIONS REPORTED IN THIS VOLUME.

Compiled Statutes.	McClain's Code.
Sec. 4108..... 314	Secs. 1729, 1730 300
Revised Statutes of Nebraska.	Code of 1897.
Sec. 498, page 478..... 313	Title 10, Ch. 4..... 411
Sec. 499, 500, page 478..... 314	Sec. 238 49
Sec. 590, page 498..... 314	Sec. 243 706
Acts 7th General Assem.	Sec. 422 141
Ch. 52, page 57..... 123	Sec. 496 64
Acts 9th General Assem.	Sec. 713 438, 442
Ch. 47, page 50..... 466	Sec. 880 411
Ch. 172, Sec. 84-91, pp. 221, 222 .. 123	Sec. 884 411
Acts 18th General Assem.	Sec. 1010 602
Ch. 151, Sec. 2, 22, p. 146.. 269	Sec. 1037 271
Acts 24th General Assem.	Sec. 1040 269
Ch. 59 28	Sec. 1041 269
Acts 25th General Assem.	Sec. 1044 271
Ch. 62, page 63..... 466	Sec. 1370 602
Acts 27th General Assem.	Sec. 1372 602
Ch. 48, page 32..... 494, 528	Sec. 1373 261, 262
Ch. 89, page 51..... 124	Sec. 1374 385
Ch. 101, page 57..... 305	Sec. 1441 112
Acts 28th General Assem.	Sec. 1571 99
Ch. 50, page 33..... 387	Sec. 1812 210
Acts 29th General Assem.	Sec. 1898 494, 528
Ch. 126, page 77 125	Sec. 1999 411
Supreme Court rule, 22.... 120	Sec. 2000 411
Revision of 1860.	Sec. 2007 685
Ch. 107, Sec. 2600..... 23	Sec. 2008 411
Sec. 1017, 1018 544	Sec. 2009 411
Sec. 1021 553	Sec. 2010 411
Sec. 2601 23	Sec. 2011 411
Sec. 2951 170	Sec. 2022 230
Code of 1873.	Sec. 2055 230
Sec. 465 507	Sec. 2387 45
Sec. 876 67	Sec. 2388 45
Sec. 912 702	Sec. 2389 46
Sec. 1557 466	Sec. 2418 466
Sec. 1747 638	Sec. 2424 155
Sec. 2452 109	Sec. 2431 46
	Sec. 2432 466
	Sec. 2448 155
	Sec. 2448, par. 10..... 467
	Sec. 2450 681
	Sec. 2452 631
	Sec. 2455 466
	Sec. 2568 28
	Sec. 2570 269

(844)

Sec. 2791	122	Sec. 3765	560
Sec. 2793	122	Sec. 3769	449
Sec. 2794	121	Sec. 3772	608
Sec. 2798	122	Sec. 3880	370
Sec. 2917	298	Sec. 3881	370
Sec. 2992	370	Sec. 3882	370
Sec. 3069	105	Sec. 3883	370
Sec. 3219	398	Sec. 3887	372, 576
Sec. 3270	22, 110	Sec. 3946	735
Sec. 3276	18	Sec. 3955	608
Sec. 3314	538	Sec. 4091	706
Sec. 3383	75	Sec. 4105	629, 640
Sec. 3398	424	Sec. 4106	640
Sec. 3446	24	Sec. 4114	406
Sec. 3447	101, 564, 737	Sec. 4118	420, 434
Sec. 3447, subd. 1.....	559	Sec. 4128	716
Sec. 3455	560	Sec. 4136	285, 679
Sec. 3493	194	Sec. 4141	578
Sec. 3517, subd. 3.....	707	Sec. 4240	475
Sec. 3547	675	Sec. 4299	221
Sec. 3548	675	Sec. 4300	221
Sec. 3557	170	Sec. 4301	221
Sec. 3563	285	Sec. 3202	454
Sec. 3574	194	Sec. 4341	141
Sec. 3574	468	Sec. 4560	236
Sec. 3600	564	Sec. 4579	237
Sec. 3601	170	Sec. 4604	105, 343, 722, 746
Sec. 3622	468	Sec. 4608	212, 343
Sec. 3641	448	Sec. 4625	177
Sec. 3648	468	Sec. 4626	177
Sec. 3652	433	Sec. 4791	37
Sec. 3655	51	Sec. 4840	703
Sec. 3764	560	Sec. 5407	246

6 A. C. V.



